AMA

THE ROYAL
AUSTRALIAN AND NEW ZEALAND
COLLEGE OF PSYCHIATRISTS

MENTAL
HEALTH
COUNCIL OF
AUSTRALIA

Australian
Private Hospitals
Association

PRIVACY KIT

for Private Sector Mental Health Service Providers

Comprising:

- Introduction
- Applying the NPPs to Clinical Practice
- Answers to Frequently Asked Questions
- Patient Information Pamphlet
- Understanding Privacy - the NPPs at a Glance

Privacy Kit for Mental Health Service Providers

PREFACE

I welcome the work of the Mental Health Coalition in developing this Kit on privacy in the mental health sector to assist providers, consumers and carers.

Privacy presents challenges for those involved with mental health services, and yet it is of great importance in the sector, not least due to the sensitivity of individuals' mental health information. The Coalition has worked with my Office to consider how some of these challenges can be addressed.

Openness in communication, and the building of shared expectations between providers, consumers and carers about how mental health information is handled, can ensure respect for consumer privacy as part of delivering quality mental health care.

The Kit has been developed by the sector for the sector; to give practical assistance to providers in meeting their privacy obligations, including through developing shared expectations with consumers and carers. Providers are encouraged to consider the suggestions in this Kit in combination with other privacy sources, such as my Office's *Guidelines on Privacy in the Private Health Sector*.

My thanks go to the Coalition for its commitment to this project.

Malcolm Crompton

Malcolm Crompton
Federal Privacy Commissioner
March 2004

PRIVACY KIT Part 1

for Private Sector Mental Health Service Providers

INTRODUCTION

Background

The National Privacy Principles (the NPPs), have been in place since December 2001. The 10 NPPs apply to all health service providers in the private sector and cover the handling of personal and health information including collection, use and disclosure, data quality and security, access and correction, anonymity and the transfer of information overseas. Mental health service providers are perhaps the group of providers who have the most questions about applying the NPPs in the course of maintaining best clinical practice.

The Mental Health Privacy Coalition (the Coalition), consisting of the Australian Medical Association (AMA), Mental Health Council of Australia (MHCA), Royal Australian and New Zealand College of Psychiatrists (RANZCP) and the Australian Private Hospitals Association (APHA), have combined their skills, knowledge and experience to develop this mental health service provider specific kit.

The Privacy Commissioner has met with the Coalition to discuss its concerns about the application of the NPPs to the mental health sector. The Commissioner recognises that there are some specific challenges in this area and believes that providers may be assisted by the development of a privacy guide for the mental health sector, focusing on best practice approaches in the particular areas of concern raised by the Coalition. These areas include: issues of competency in obtaining consent, the importance of delivering holistic treatment and care, and obligations to provide patients with access to their personal information.

Feedback from providers of mental health services revealed specific concerns about the impact of the application of the NPPs on patients and clinical practice. Psychiatrists in particular, were worried that some aspects of the NPPs and the applicable Guidelines might have potential for interfering with the therapeutic relationship and the provision of holistic care. Mental health consumer and carer groups expressed similar concerns about the application of privacy law.

Purpose of this Kit

The kit is intended to support the therapeutic relationship between a mental health service provider and the patient. One of the aims of the kit is to assist providers in developing their own privacy policies that suit the needs of their patients and their practices, and to assist them to handle health information in ways which comply with privacy legislation while maintaining high ethical and professional standards. Better understanding of the areas of concern will improve your knowledge of privacy law, and resolve most areas of uncertainty in both clinical and privacy practice.

The Coalition's essential message to all mental health service providers is that effective two-way provider-patient communication is required to obtain patient understanding of, and consent to, how patient information is to be handled.

There is nothing in privacy law that should interfere with good holistic health care, across the continuum of care. If a patient wishes to be treated holistically across a continuum of care, then a clear understanding of what that means for the patient should be discussed. Such explanation should contain the reasons for a broader collection of information, and any likely disclosure of that information that might be needed for the patient's ongoing health care (just two of the key requirements of the NPPs, see Privacy Commissioner's Guidelines).

In the provision of mental health services, a better alignment of patient and mental health service provider expectations should allow compliance with privacy requirements in a way that contributes to the therapeutic relationship.

Review of the Privacy Act

There will be a review of the amendments to the *Privacy Act 1988* (Cth) in 2004 including the NPPs. It is important that mental health service providers give the Coalition feedback on the working of the legislation in the context of the provisions of mental health care. Feedback can be given to the Coalition via the website: http://www.spgpps.com, or through providers' representative bodies.

Definition of Mental Health Service Provider

For the purpose of this Kit, the term mental health service provider (hereafter 'provider') includes the whole of the mental health workforce that provides a 'mental health service' in the private sector. The Kit has been developed primarily with the following types of providers in mind. This list is not exhaustive, and any health service provider, or organisation working closely with them, may choose to consult this Kit.

- general practitioners (GPs)
- psychiatrists
- mental health nurses, nurse practitioners and clinical nurse consultants
- psychologists
- private hospitals with psychiatric beds (hereafter 'hospitals') and day-only centres
- private aged care facilities
- other mental health and allied health professionals including psychologists, social workers
- health services provided in the non-government sector, such as phone counselling services or drug and alcohol services

- Aboriginal community controlled health organisations
- health services provided via the Internet (eg counselling, advice, medicines), tele-health and health mail order companies

Contents of this Kit

- Background information is contained in this part of the Kit (Part 1).
- Part 2 contains an overview of how the NPPs apply to clinical practice.
- Part 3 sets out frequently asked questions with answers and suggested solutions for overcoming any real or perceived difficulties in the application of the NPPs.
- Part 4 provides a patient information pamphlet as an example of a privacy policy that might be drawn upon, adjusted, or modified to assist providers develop a privacy policy tailored to suit their patients' special needs. Provision of such pamphlets should occur within the context of the therapeutic relationship at a time that is appropriate for the patient and the provider.
- Part 5 summarises the NPPs and provides more information and references to further resources.

Disclaimer

The AMA and the Coalition have made every effort to ensure that, at the date of publication, the information contained in this kit is free from errors and omissions and that all opinions, advice and information drawn upon to compile it have been provided by professionals in good faith. The information and recommendations contained within it are considered to be consistent with the law and applicable Guidelines at the time of publication. However, they do not constitute legal advice. The information provided is not intended to be comprehensive. Providers concerned about their legal rights and obligations in relation to Federal, State or Territory privacy legislation may wish to seek their own independent legal advice.

Applying the NPPs to Clinical Practice

A sensible application of privacy law is likely to enhance, and not hinder the provision of quality heath care. **The NPPs relate to the handling of personal information and are not intended to impede clinical decision making.** The Privacy Commissioner's foreword to the *Guidelines on Privacy in the Private Health Sector* acknowledges that "the health service provider's principal concern is the health care of the patient".

An initial step, therefore, in considering privacy compliance obligations, is to identify what, in the provider's judgement in any particular situation, is best clinical practice. It is likely that this incorporates good privacy practice. In most cases, compliance with the NPPs is likely to enhance best clinical practice, improve patient satisfaction and the provider-patient relationship. Those outcomes are conducive to good general health and well being, and complement the duty of confidentiality that providers already practice.

Providers need to acknowledge that a patient's family members' and carers' legitimate concern is also the health care of the patient. At the first appropriate opportunity, providers should discuss with the patient the benefits of sharing information where appropriate, with their preferred family members and carers. The provider should then seek the patient's consent to the sharing of such information.

However, in some situations compliance with privacy obligations might, at first glance, appear to be impracticable or to interfere with best clinical practice or patient outcomes. Several NPP obligations require only that 'reasonable steps' be taken to meet certain requirements, or that the required action need only be taken where it is 'reasonable and practicable to do so'. If a provider is concerned that the action would cause harm to the individual, it can be argued that it is not reasonable to undertake it.

Further, a provider's privacy policy should be designed or may need to be adjusted to comply with the NPPs in a way that does not impact on best clinical practice, or in fact enhances it. By way of example is a policy that encourages early communication with patients to inform them of the provider's holistic approach to treatment and care, or spelling out in more detail the provider's information management policies, so that a patient can raise matters of concern earlier, and the provider can consider whether the concerns can be accommodated or not.

Central to the provision of the mental health service is the therapeutic nature of the relationship between the provider and the patient. This relationship is contingent on the open and honest disclosure of intimate information by a patient to the provider.

On the mere collection of information the therapeutic relationship commences. Everything about the person's behaviour and the individual provider response constitute part of the therapeutic relationship that is critical to patient treatment and care.

In the context of this relationship, the privacy principles should only reinforce this imperative. However, if as a provider you feel that compliance with the NPPs has the potential to interfere with the necessary clinical judgement constantly being exercised by you as a clinician in the course of a therapeutic relationship, and in the provision of holistic or continuous care, you may need to consult your representative body. General advice can be sought from the Office of the Federal Privacy Commissioner (OFPC), however, OFPC is not in a position to provide advice on specific cases.

Problematic situations should be documented and referred to the OFPC and the Coalition for consideration in the upcoming review of the privacy legislation.

The therapeutic relationship needs to be protected and supported, so **the NPPs should be applied consistent with this notion.** To do this, some concepts in the NPPs need to be explained and understood.

Explaining the key relevant National Privacy Principles

The NPPs set out the minimum standards for information privacy. They were introduced by the *Privacy Amendment (Private Sector) Act 2000*, (the Act), which extended the *Privacy Act 1988* to cover the Australian private sector, including the private health sector. The NPPs are summarised on the back page of this kit. We will assume that you have already made yourself familiar, in general, with the NPP's through reading the OFPC's Guidelines, the AMA Privacy Resource Kit`or other of the resources listed on the back page of this Kit.

The following discussion explains in a little more detail, the application of the NPP's in mental health.

NPP 1 - Collection

This principle sets out what a person has to be told when information is collected about them. As applied to a doctor or any provider of a health service, in taking a full history, or any other information, NPP 1 requires that:

- Collection of personal information must be necessary, fair, lawful and not unreasonably intrusive.
- A person must be told the organisation's name, the purpose of the collection, usual disclosures (eg to GP or other health providers), and
- that the person can get access to their personal information, and
- what the consequences are if the person does not provide the information asked of them, and
- any law that requires the information to be collected (eg infectious diseases notification, mental health legislation), and
- any consequences that might arise if an individual omits part or all of the information requested

NPP1 has to be read by providers in conjunction with NPP 10.

If it is not practicable to tell the person these things at the time of collection, they must be told as soon as it is practicable. For example, if a person is in a state where they cannot comprehend the information, they could be told later when they are better able to understand.

NPP 10 - Sensitive information

All personal information collected by a provider is ‘sensitive information’, and NPP 10 requires an individual to consent to the collection of ‘sensitive information’, unless it falls within an exempt category, such as

- the collection is required by law (such as mental health legislation governing patient certification/recommendation procedures) - NPP 10.1(b); NPP 10.2(b) (i), or it is
- necessary to prevent or lessen ‘a serious and imminent threat to the life or health of any individual’, and the person in unable for explicit reasons to give consent (such a threat will also often apply at the time of mental health certification/recommendation procedures) - NPP 10.1(c), or it is
- information required for management, research or statistical purposes, which cannot be obtained in de-identified format, consent is impractical, and Section 95A guidelines are used in treating the information (this may occur in private psychiatric hospital information management for efficient and safe practice) - NPP 10.3; see also Sheet 9 - 2001, “Handling Health Information for Research and Management”.

NPP 2 - Use and Disclosure

This principle sets out how health information once collected can be used and disclosed, and the consent requirements for such use and disclosure. ‘Use’ in this context means, referring to, or otherwise using, the information within the provider’s organisation. ‘Disclosure’ in this context means, disclosing information to others outside the provider’s organisation, such as sharing information with members of a treating team, carers, or a referring provider.

A health organisation should only use or disclose information:

- for the ‘primary purpose’ (and there is to be only one such purpose) for which it was collected; or
- for directly related secondary purposes which are within the person’s reasonable expectations;

unless the person has consented, or unless circumstances relate to public interest such as law enforcement and public or individual health and safety.

A health provider may also communicate mental health information to a responsible person (eg a partner, family member, carer, guardian or close friend), where it is necessary for the patient’s appropriate care or treatment; or for compassionate reasons.

Providers should familiarise themselves with the terms of the exceptions under NPP 2. The NPPs are set out in the OFPC's guidelines and are available online at http://www.privacy.gov.au/publications/npps01.html.

In most circumstances in the mental health sector, the primary purpose of collection will be to deliver mental health services to the patient, and consent is not required for use and disclosure of personal information that served this primary purpose.

Disclosing mental health information without consent, about a person who has been certified/recommended for involuntary treatment, is allowed where the purpose is to adequately care for and treat that person (NPP 2.1(e); 2.1(g)). Similarly, disclosure at a mental health review tribunal, or similar statutory body set up under State or Territory law, is allowable because of its legal tribunal status.

The concepts of 'primary purpose' and 'secondary purposes'

To accommodate the provision of patient care within the context of a continuum of care, patient understanding of the essential purpose for collecting their information is crucial. Obtaining informed consent to collect information for such an approach to patient care - that is, care not restricted to the immediate circumstances, but for the patient's general and ongoing healthcare - can obviate the need to obtain further consent for handling the same information on subsequent occasions. If a continuum of care approach is to be encouraged it is important that providers clearly identify the broader primary purpose of collecting information and align their expectations with those of the patient. Repeated consent should then, NOT be required for the ongoing holistic care. Thereafter, if disclosure is required for medical research, for example, this is clearly a secondary use that would require specific patient consent. It is essential that consent to collect information for use or disclosure for the broader purpose of "continuum of care" must be fully informed and not coerced.

NPP3 and NPP4

Providers in mental health are usually well aware of the need to ensure the information we collect and hold about our consumers is accurate, complete, up-to-date, and that it is secure. These two NPP's refer to these important aspects of dealing with our consumer's information. We should also try to be aware of the limits of completeness and accuracy of information, especially hearsay information provided by third parties, and information from the patient about third parties.

Because many in the community would see stored mental health information as especially sensitive, it is important to ensure good security of patient records. Prevention of unauthorised access, and clear staff access privileges with confidentiality agreements are basic areas of attention. Disposal of records on cessation of practice, or after statutory time periods have elapsed, is another key issue to think about. Careful dealing with electronic records or patient information is of course vital, and help can be obtained from a number of sources listed at the end of this kit (see Information Sheet 6 - "Security and Personal Information", OFPC; Standards Australia: AS/NZS ISO/IEC 17799:2001 and AS/NZS 7799.2:2000; the AMA Privacy Kit; and APHA/PHAQ Privacy Kit).

NPP5 - Openness

Providers must have a policy document outlining their information handling practices and make this available to anyone who asks. It is through this openness that some of the consent requirements can be overcome. However, having an open policy, and displaying privacy information clearly does not obviate the need to ensure that the consumer understands the privacy policy clearly, and to obtain relevant consent. This will often require direct explanation, and asking for questions from the consumer. Specifically, on request, a provider must also take reasonable steps to let a person know what sort of personal information it holds, for what purposes, and how it collects, holds, uses and discloses that information (NPP 5.2).

NPP6 - Access and Correction

Generally speaking an organisation must give an individual access to personal information it holds about the individual on request. The intention of NPP6 is that unless an exemption applies, a competent person will have access to all information held about them.

The policy document may need to outline a provider's preferences in providing personal information access. It might mention any preferred methods of providing access to patient information, any reasons for the need to restrict full access to clinical and process notes, and outline circumstances where restriction might apply.

The Main Areas of Concern for Providers

The main areas of concern to all providers, and mental health service providers in particular, surround the consent requirements for information to be collected, the restrictions on the use and disclosure of the information without further consent, and patient access to their clinical notes.

Obtaining a patient's consent at the time information is collected, when the person's capacity to give fully informed consent cannot be assessed until and unless information is collected, poses a problem. In this situation, consent to collect the information is not required if the collection is necessary to prevent or lessen a serious and imminent threat to the health or life of the patient or any other person and the patient is not legally capable of giving consent.

Second, collection of information includes, not just information from patients about themselves, but also information about others, whether true or accurate or not, and also includes the provider's own interactive thoughts and comments, as well as, possibly, information from other sources, such as third parties. This gives rise to several concerns that have been expressed to the Coalition.

- Obtaining the consent of the third parties to the collection of the information, and telling the patient what has been collected and from whom, as required by privacy law, might appear to interfere with the therapeutic process at the outset. Note, however, NPPs 1.3 and 1.5 include the notions of 'reasonable steps' and 'where practicable'. For example, if a patient is very agitated and unable to comprehend the information, it could be impracticable to tell them what has been collected. The NPPs would allow this to be done later, when it is practicable.

- There is often a need to receive from and share information with members of multidisciplinary treating teams in order to treat the patient, but sometimes there is a lack of certainty about whether a patient at any particular point in time is able to fully understand and make decisions about the way in which their information is handled.
- Possible breaches of trust and/or confidentiality might arise from the need to obtain consent of a family member before information is disclosed to a hospital or another member of the treating team. Disclosure to a responsible person for the purpose of obtaining consent will not be required if the proposed use or disclosure of information is for the primary purpose, or directly related secondary purpose within reasonable expectations.
- Obtaining the patient's consent in order to disclose necessary information to relevant family members and carers may, by the necessary revelations to the patient, cause the patient harm. However, the patient's consent is not required for disclosure to carers in cases where the patient cannot legally consent, and the disclosure is needed for compassionate reasons or to provide appropriate care. Disclosure to carers to enable follow-up care or treatment may also be considered an allowable secondary purpose, if it is within a patient's reasonable expectations. In other circumstances, disclosure to carers may also be required to lessen or prevent a serious and imminent threat to any individual's health, life or safety and this is allowed by the NPPs.
- Harm might arise from a patient having access to their clinical notes including the clinician's process notes, and where access is legitimately restricted, the harm sought to be avoided, might occur, from having to give the patient the reasons for the restriction.

Patient access to their notes is a special area of concern for providers.

- Patients have a general right to access all information held about them. This includes the parts of the health record that relates to the treating provider's own thoughts concerning the patient (*process notes*), and also comments that may have been received from carers about the patient and other members of the treating team. The taking of frank interactive process notes may form an important part of patient assessment and treatment.

There are a number of exceptions to the access requirements listed under the Act. Refer to the full guidelines for detailed explanation, but the main exemptions that might involve mental health provision include:

- Where providing access "would pose a serious threat to life or health" of the patient, or to any other person (including the provider). Such serious threat can include physical or mental health harm, and a person experiencing "significant distress" may in turn lead to a serious risk to the individual's health (p45, of the OFPC's "Guidelines on Privacy in the Private Health Sector"). Consumer and carer representatives of the Coalition felt that severe disruption of the therapeutic relationship could lead to a serious threat to mental health for some individuals. Under the Act, mental health providers are required to make the decision about whether a serious threat applies in a particular situation. (NPP 6.1(b))
- Where providing access may affect the privacy of others. Where information concerns third party privacy, either consent should be sought, or if that is not possible, the information and any identifying context should be removed before release. Where the provider's own privacy might be violated (eg by countertransference notations), these references should be removed

before release. (NPP 6.1(c)) Where there is a legitimate reason to withhold part of the information, the rest of the information should be provided (p45, OFPC's "Guidelines on Privacy in the Private Health Sector"). If a significant proportion of the record is exempt material, it may be preferable to consider other methods of providing access to the remaining information, such as the use of intermediaries or a summary, rather than providing copies of documents that have been extensively "whited out". Such other methods of access should be discussed with the consumer.

- Where a request is vexatious or frivolous (NPP 6.1(d)). Err on the side of providing access, but if you consider this situation might apply, we suggest you seek advice from the Commissioner, or an expert in your representative body. However, the OFPC is only in a position to offer general advice, and cannot provide advice on specific cases. In most instances, providers should seek advice from their industry body.
- Where information relates to legal proceedings, anticipated or under way (NPP 6.1(e)), where access would prejudice negotiations (NPP 6.1(f)), where access is unlawful or denied under the law (NPP's 6.1(g), (h), (i), (j), (k))

The exemptions permitted by law to the obligation to provide access to all patient information overcome some concerns. However, some providers are finding difficulty with the requirement that there must be a *serious threat* to the life or health of the patient or another person before that exemption can be invoked. Harm alone is not sufficient and interference with the therapeutic process may not be a sufficient reason to restrict access to clinical notes to patients.

For example, patient access to process notes may interfere with the therapeutic relationship, though not necessarily pose a *serious threat* to the patient's health. Even where the access is legitimately denied because of the risk of such a threat to the patient's health, the requirement that the reason for the denial has to be given might cause the same risk of harm and defeat the purpose of restricting the access.

The next two pages include guidance on how to continue best practice without infringing the privacy legislation. Included are some commonly asked questions and a suggested protocol that may assist providers in handling information in a manner consistent with the therapeutic relationship between the provider and their patient.

The Way Forward

Originally, an interpretation of NPP1, 10 and 2 meant that full family and social medical histories could not be taken without family members' and other third parties' consent. In recognition of that the Privacy Commissioner issued a Public Interest Determination (PID) that relieves health service providers from the obligation of obtaining the other person's consent, and explaining to them how the information about them will be handled when taking histories from a patient.

A copy of the PID can be obtained from the OFPC or via the internet at:

http://www.privacy.gov.au/health/determinations

Health information cannot normally be used or disclosed for any purpose other than the assessment, diagnosis or treatment of the presenting condition, or the particular episode of care, unless the 'main purpose' of collecting the information has been more broadly agreed upon between the provider and the patient.

It is important, therefore, that there be a meeting of minds between the provider and patient about the type of service to be provided. For example, if an holistic and "continuity of care" approach is to be taken, with concomitant extensive communication with multidisciplinary teams or other health providers, then this broader purpose for collecting and disclosing information should be understood and accepted by the patient. This can be assisted by the 'openness' process. The provider can outline the nature of the service they will be providing, (eg an holistic approach to patient care will have different implications as to the way patient information is handled than, say, for a clinic that provides a travel vaccination or immunisation service) in their policy document, as well as communicating with the patient about it. It should be noted that consent to a broader "main purpose" must be fully informed and not coerced.

The provider may wish to develop a policy about preferred methods of patient access to notes in different circumstances, devised to support the therapeutic relationship. This too can be outlined in the policy document and discussed with the patient.

It is important, however, that the privacy legislation is not used as an excuse to block the sharing of information with the patient or with their carers and other members of the treating team where appropriate.

PRIVACY KIT Part 3

Answers to Frequently Asked Questions

COLLECTION

How does a provider explain the need to collect, and the nature of, the information that is required for effective treatment and care without alarming the patient?

In the course of treatment and care the information collected might include, not just information from patients about themselves, but information about others, whether true and accurate or not. It sometimes includes the provider's own interactive thoughts and comments, and information might already have been received from other sources. Explaining this might, in some circumstances give rise to questions that are difficult to answer, and could interfere with, or at least disrupt, the therapeutic process at the outset.

The provider must first assess what is best clinical practice. If an open and frank discussion in the patient's particular circumstances is not in the patient's best interests, what degree of harm might be done, and to whom? These are the questions that are best answered by the provider on the spot. The use of the provider's best clinical judgement must surely form part of best practice.

Note that the obligations to tell patients about information collected about them are qualified by the terms 'take reasonable steps' and 'where practicable'. In the context of a therapeutic relationship factors such as potential harm to the relationship could be considered in deciding what would constitute reasonable steps in a particular case. Consideration should also be given to the circumstances in which consent to the collection of information can be implied in the case of voluntary consultations, as against the situation of an involuntary patient.

To comply with the privacy legislation providers should, with legally competent patients, develop and make available to their patients their information handling policies. Well thought out policies should be formulated to suit the particular needs of the provider and their patients, and perhaps set out in a patient information pamphlet that is given to all new patients or their guardians at an appropriate time, and is used as a discussion point.

The pamphlet might set out:

- the type of information that is likely to be collected about patients for the purpose of treatment and care,
- the fact that there might be circumstances where information might have to be collected before the patient sees the provider, and

- that non-factual information, such as the provider's own preliminary thoughts and comments, as well as factual information will form part of the patient record.

CONSENT

What constitutes fully informed consent in circumstances where mental illness sometimes renders patients temporarily 'legally incompetent'?

The subtleties of a patient's condition at any particular point in time may not be easily identifiable. Mental illnesses and disorders can subtly render some people less than competent, especially at the beginning of an illness.

Competency changes from hour-to-hour as well as day-to-day. Provider judgement as to competency necessarily has to be made. Confidentiality has to be respected, and this needs to be weighed against the possible need to obtain third party consent. If third party consent has to be obtained before the patient can receive treatment and care, then it would seem appropriate to obtain third party consent at the same time for the collection and necessary use and disclosure of the patient's personal information.

The need to maintain patient confidentiality might warrant a deferral of the decision to seek the consent of a third person, particularly where the provider reasonably believes that the patient is likely to be in a position to make his or her own decisions as to the way their information is handled within a reasonable time frame. No consent is required where collection of information is necessary because of a serious or imminent threat to life or health of the individual, but other legal processes may apply in those circumstances.

Can I collect family histories without the consent of family members?

The taking of full family histories, social histories, and verbatim information about other people whether accurate or inaccurate may be essential to the therapeutic process for a person with a mental illness or disorder.

A provider is currently free to take all information required in the patient's interest without the cost, and disruption of obtaining third party consent, and without the automatic third party right of correction of inaccurate material. This is because the Privacy Commissioner has issued a Public Interest Determination (PID), effective from December 2002, to enable health service providers to continue the collection of their patient's social, family and medical history. The PID will be reviewed in 5 years. Further details can be obtained from the website: www.privacy.gov.au.

Providers, and indeed all doctors, should continue their best clinical practice in this regard.

What is 'informed consent' and when can consent be 'implied'?

By definition consent has to be fully informed and genuinely given. It does not necessarily have to be in writing. Written consent does not necessarily mean the patient has understood what it is they are consenting to. Consent forms and patient information pamphlets cannot replace clear and effective provider-patient communication to achieve a patient's understanding and agreement on matters, such as the way in which their information is to be handled.

Consent can be express or implied. The fact that a patient presents for health care and freely gives a medical history will generally be evidence of consent. The consent in this example is implied.

How do I comply with the consent requirements without interfering with the therapeutic relationship?

Early and ongoing discussion with patients as to the way their information will be handled usually forms an important part of the ongoing therapeutic relationship. But complying with consent requirements on a recurring basis might be destructive of that relationship, is not usually required, and can be overcome by effective and timely provider-patient communication.

If a continuum of care rather than episodic approach is to be taken by the provider to patient health care, it is important that patients understand and accept that their personal information will be used and disclosed as required in the course of this care concept. This understanding should remove any possible disruption to the therapeutic relationship that might otherwise arise.

How can private hospitals ensure they obtain informed consent when a person presents with an acute episode of a mental illness or disorder?

They can't always. Private hospitals need to admit patients when necessary, and particularly in emergencies, whether or not the hospital can accurately assess the patient's capacity to make fully informed decisions about the way their information is to be handled. Clinical protocols already exist in relation to patient consent to admission and treatment. The same considerations and protocols will apply in relation to the handling of patient personal information as those, which apply to their treatment and care. At an appropriate time after the patient has been assessed as having the competency to make decisions the patient should be informed what information has been collected about them, from where, and other matters concerning the information collected about them as required by NPP1.

If at any particular point in time the patient does not have the relevant capacity to provide consent, then a clinical judgement should be made as to whether a carer, guardian or family member should be involved in the decision making. If that action has been taken in relation to the patient's treatment and care, it is likely to follow that the same would apply in relation to the handling of the patient's personal information.

Can I assume the patient has given implied consent to my collection of information when I am not necessarily sure at the beginning of treatment of the patient's competency?

Providers cannot always be sure at the outset, of the patient's competency to consent to the collection of information about them, or that they understand how their information will be handled. Yet, collection of their information is required before any such assessment can be made. The provider must rely on their best clinical judgment at the time.

Generally, the circumstances in which a patient attends the provider will indicate whether the patient has consented to being under the care of the provider. If so, the patient's consent to the collection of necessary information can reasonably be implied. Alternatively, in an emergency situation, or where, the circumstances of the patient's attendance are such that it is appropriate for the provider in his or her clinical judgment to assess, diagnose or treat the patient without the patient's or third party consent, and the collection of their information is necessary for this purpose, then consent is generally not required (NPP 10.1(c)).

Confidentiality has to be respected, and disclosure of information about the patient in order to obtain the required third party consent, might breach provider-patient confidentiality.

If the provider has doubts about the patient's capacity, or later concludes that the patient did not have the capacity, to understand how their information is being used, this can be discussed again with the patient at an appropriate time.

From whom should I obtain consent when dealing with young people who have a mental illness or disorder?

Best clinical practice is likely to be good privacy practice in this situation. Privacy legislation aside, providers have to act in accordance with best clinical practice in order to obtain the patient's (or their parents' or guardians') consent and decision input to treatment and care options. In all likelihood this will require an assessment of the young person's capacity to make decisions, not only about how their information should be handled, but also about their treatment options and as to whom else should be involved. A provider might choose to discuss with the young person the provider's wish to discuss the person's problems with their parent(s) in order to involve the parent(s) in the decision making process.

Providers are probably already complying with the privacy legislation in the normal course of most aspects of communicating with their patients.

When obtaining third party consent, how can I be sure who the correct person is to give consent?

As a mental health provider you need to exercise judgement about who the appropriate carer, guardian or family member is, and from whom consent should be obtained on behalf of the patient. The confidential nature of the provider's relationship with the patient has to be borne in mind.

Where such a search might cause an unnecessary or dangerous delay in treatment, a provider should be able to obtain the necessary consent without undertaking an onerous search for the appropriate person to contact.

There might be circumstances in which the provider judges that it is in the patient's best interests that necessary information should be collected without seeking the consent of a third party, rather than delay treatment.

Collection in these circumstances will often be permitted under NPP 10.1 (c), if the collection is necessary to lessen a serious and imminent threat to the health of the patient and the patient is legally incapable of giving consent.

USE AND DISCLOSURE

In what circumstances can information be shared with members of the multi-disciplinary treating team where there is lack of certainty as to whether a person is able to fully understand and make decisions about their health information?

The use and disclosure of personal information for the delivery of clinical care is permitted by the NPPs and does not require patient consent.

Privacy legislation aside, the provider in following best clinical practice may need to refer patients to other members of a treating team, arrange for hospital admissions and make treatment and care plans. The same considerations that apply before those actions are taken apply in relation to the way in which the patient's information is handled. If, for the purpose of appropriate clinical care, information has to be shared with a treating team, then consent for that is generally implied by the patient's acceptance of the mode of treatment described at the outset, and best clinical practice is supported under privacy law.

The patient's health care is the prime concern, and the need for the patient to be treated and for patient confidentiality to be respected will dictate whether the patient or a guardian's consent is required and understanding sought about the information collected and the way in which it is to be handled.

Where do I stand when I have to check information with other bodies, particularly when I am not always sure at the beginning of treatment of the value of information provided?

The freedom of providers to contact other people, where appropriate, without risking loss of patient confidence is highly dependent upon their existing relationship with their patient. In an emergency where meaningful discussion with the patient is not possible, it is a provider's call as to what information is required for the purpose of assessing, diagnosing and treating the patient. The provider uses his or her best judgement in assessing what information needs to be collected and its value when considering treatment and care options.

The privacy legislation does not interfere with that clinical judgement. It simply demands that, at an appropriate time after the patient is assessed as having the capacity to make decisions about their treatment and care, discussion takes place as to how their information is being handled in the course of that treatment and care.

There is no obligation to disclose to the patient the source of the information collected. If the patient requests access to information, and giving access is likely to cause a serious threat to any person (including the patient), or impact on another person's privacy, then access may be denied. Consideration should be given to giving access in some other way, for example, through an intermediary.

What are the privacy implications of regulatory organisations, such as the Australian Council on Health Care Standards (ACHS), or private health insurance funds asking for or requiring access to patients' medical records?

A provider organisation's privacy policy should make clear that patient information will generally not be disclosed to others without the patient's consent. However, there are situations where disclosure is required by law, and disclosure might occur in the course of compliance with quality and safety programs. It is permissible to disclose patient information to other organisations where the disclosure is directly related to the main purpose of collecting the information and is in the reasonable expectation of the patient. Carefully considered patient information pamphlets can assist patient understanding as to which outside organisations their information might reasonably be disclosed.

With the introduction of privacy legislation will hospitals cease to inform referring providers, of progress during or after their patient's hospital admittance?

Privacy legislation should not change the current practice of keeping referring providers informed. Best clinical practice should prevail. Some feedback has revealed that not all patients understand that hospitals share information held about them with their referring provider. Private hospitals should ensure that their patients understand and agree that this will occur in the normal course. This can take place in the course of informing patients on collection of their information how it will be handled, including what will be disclosed, and to whom. This can be achieved by the hospital developing an appropriate privacy policy and providing privacy information to the patient. Essential guidance for hospitals can be found in the APHA/PHAQ Privacy Kit.

Is it appropriate to see patients in the presence of family and carers?

Seeing a patient in the presence of a family member or carer(s) with the patient's genuine consent may be of benefit to the therapeutic process. A carer being aware of a medication regime is one example. However, the provider needs to identify when sensitive material might be raised so that the patient can choose whether they wish the other person to be present.

Does privacy legislation prevent mental health boards or tribunals from making enquiries about a patient's social situation before discharge from care?

Discharging someone from a facility without a plan in place for their treatment and care could pose a serious threat to the person's life or health, or to that of some other person. Thus, disclosure of a person's health information in the course of making appropriate care plans for them is not contrary to the privacy legislation. The privacy legislation should not be used to justify the lack of inquiry being made about the availability of family or community support. Further, carers may have a responsibility but they also have rights, and their health and safety might also be an issue. Therefore, privacy and confidentiality concerns have to be dealt with thoughtfully. Even though formal consent mechanisms are usually not required of a tribunal, before discharging a patient from a facility, a mental health board or tribunal should ideally obtain the patient's understanding that their family, or carer(s) will be informed so that they can be properly prepared to fulfil their responsibilities.

Can a treating team share information with a patient's carer(s)?

In many situations there are better health outcomes if the carer(s) are involved. The patient's understanding and acceptance of this needs to be obtained and the patient should be given the opportunity to reject this. The timing of obtaining the patient's consent is crucial. The provider must consider what state the patient's health is in and use their best clinical judgement, bearing in mind the patient's right to privacy.

ACCESS

Can I restrict patient access to mental health notes?

Providers collect information during counselling sessions, and psychiatrists in particular make process notes that often record details of their interactive discussions with their patients. The therapeutic process often requires a verbatim record of a patient's account of events that involve other people, or indeed the doctor, which are not necessarily accurate.

Where access to the notes is requested, providers should consider whether providing access would pose 'a serious threat' to the life or health of a patient or to any other person, or whether providing access would have an unreasonable impact upon the privacy of another, including the provider. If either of these is likely to occur, restriction to the patient's access to the notes, or relevant parts of the notes is permitted under privacy law.

If there are no grounds for refusing access to all the information held, then ready facilitation of their request should occur. Reasonable, but not excessive, charges may be made where costs are incurred in providing access. If the provision of full access is likely to be quite onerous for the patient, then alternative means of providing access to copying the complete notes should be discussed with the patient. For example, a summary report could be provided. Up-front open communication with patients is to be encouraged.

Conversely, where there are grounds for refusing access to any information, other means of providing access might be considered, such as providing a summary or engaging an intermediary.

In the therapeutic context unfettered access of clinical or process notes might cause harm to the patient or interfere with the therapeutic relationship without posing a 'serious threat' to the patient's life or health. If access to the notes is likely to disrupt the treatment being offered (if, for example, it might lead to the patient losing trust in the provider and deciding to cease treatment or find another provider) consideration should be given to whether this could cause a 'serious threat to the life or health' of the patient or any person.

Much of this could be achieved by an appropriately worded patient information pamphlet, of the kind set out in the sample pamphlet provided in Part 4 of this Kit.

To minimise the risk of a problem arising over access in the course of a therapeutic relationship, a provider might choose to let patients know in advance that most of the material collected from the patient will be in the form of 'process notes', rather than factual material. They might explain that patient access to such notes is likely to impede the therapeutic relationship and for this reason it is not the provider's practice to provide copies of other than the factual notes to the patient without discussion of other means of access.

Should I keep my process notes separate?

Artificial separation of factual material and interactive process notes is not advisable if done for privacy compliance reasons alone. Providers should use their best clinical judgement and take notes in the form that best suits the delivery of the services they provide. There are other ways of providing patient access to notes than making copies of them available to the patient. The 'whiting out' of harmful or restricted information, however, is not recommended, as it is likely to give rise to questions that if answered might interfere with the therapeutic process. The patient may prefer to receive a summary report of the notes, and if so, this would meet the access obligations under the privacy legislation. A legally competent patient will continue to have a right to request access to all information held about them by the provider, but not to information that may breach the privacy of another person (including the provider), and not to information that might pose a serious threat to life or health of a person.

What reasons should be given to the patient for restricting access?

There is no easy answer to this question. Where access to patient information, or part of it, is restricted because it poses a 'serious threat to the life or health' of the patient (or any other person), giving the reason for the restriction might cause the same risk of harm. Best clinical judgement and skills must be used when explaining to a patient the need to, and reason for, restricting access. That might simply consist of the explanation that the access is likely to impede the therapeutic process.

Again, if the problem is not resolved, the provider is obliged to consider the use of an intermediary.

The patient is more likely to understand the reason for restriction if at the beginning of the therapeutic relationship this possible event is discussed, or at least foreshadowed in an appropriately worded patient information pamphlet, of the kind set out in the sample pamphlet provided in this kit.

How is the movement of notes between public and private hospitals and providers' rooms to be handled, particularly when this removes control of access to the notes from treating doctor?

Most health care provider organisations are subject to the same or similar privacy legislation and record handling laws as providers.

Providers should record in their notes any part of them to which access restrictions apply and reasons, so that other health service providers are aware of the restriction, or of the need to contact the treating provider before any access request is met.

How do I handle the need of carers and family to access patient information?

As soon as a provider is aware of the need for carers or family members involved in a patient's care to know clinical information about the patient, this should be raised and discussed with the patient, unless the disclosure without such a discussion or patient consent is necessary to lessen or prevent a serious and imminent threat to the patient's or another person's life, health or safety.

The provider's privacy information pamphlet should ideally set out the benefit to the patient in certain circumstances, for information to be shared with carers or key family members.

Do I have to correct information accurately noted at the time, but as to which the patient later requests a correction?

The provider may have a practice of taking information verbatim from a patient, whether correct or incorrect. If a patient believes that personal information about them is not up-to-date, accurate and complete they can ask to have it amended. A provider must then take reasonable steps to correct the information.

This does not necessarily mean that the record is altered. Where the provider disagrees with the patient request for correction, it should be noted in the record, together with the date when the correction was sought. Where the provider accepts the correction there may be important medical and legal reasons for retaining a complete record and the provider should generally attach comments to the record noting the correct information rather than permanently erasing details from the health record.

The APHA/PHAQ Privacy Kit (referred to in Further Information at the back of this Kit), includes a sample 'Request to Amend a Patient Record', which hospitals may use as a model or adapt to their particular requirements.

Who should sit with the patient to interpret and explain hospital notes?

Everyone involved in the patient's treatment and care contributes to the patient's notes including psychiatrists, nurses, psychologists and pharmacists, to name a few. Hospital notes are used as a communication tool. They are generally written up after the event. Sometimes doctors take the notes to write in them at the time of seeing the patient. Patients are unlikely to read or fully understand the entries made in the notes. When a nurse reads to the patient the notes of another nurse the patient may state that the notes are inaccurate. A provider may have reason to believe that a patient is accessing notes to play one provider off against another. This situation has to be handled in a sensitive manner that accords with best clinical practice. In some circumstances it might be reasonable to delay access for a reasonable time or to seek clarification from the patient of what they want to know, or discuss the request with others on the treating team.

All providers should ensure that their staff achieve best practice in note taking.

If a patient whose condition is stable wants access to their notes well after the episode of care, can it be denied on the grounds that revelation of details of what occurred during therapy might have a negative impact on them?

A situation might arise where an early differential or provisional diagnosis was made which transpired to be incorrect, and the patient's knowledge of it might cause offence, or a recurrence of an episode. The provider has to consider whether the access would pose a 'serious threat' to the life or health of that person. As the legislation stands, 'harm' is not a sufficient reason to withhold access. In such a situation consideration must be given as to how the access could be achieved to minimise any harm to the person.

How are disputes over access to be resolved?

Resolution of disputes should not disrupt the therapeutic process.

If there are grounds for denying access providers are obliged to consider the use of intermediaries. Where third party intervention might disrupt the therapeutic process and cause serious harm to the patient or another person, or expose the provider to litigation, the provider should exercise his or her judgement as to whether there are reasonable grounds for not using an intermediary. It is clear that the provider must provide the necessary clinical judgement about the risks of serious harm. If an intermediary cannot be used, or is refused by the patient, it would be prudent to seek expert advice, including legal advice, advice from the Office of the Privacy Commissioner, or expert advice if available from your representative body. However, the OFPC is only in a position to offer general advice, and cannot provide advice on specific cases. In most instances, providers should seek advice from their industry body.

MEDICO-LEGAL

Do I have to provide material asked for in a subpoena, which, if revealed to a patient, may cause them serious harm?

A subpoena has to be complied with. The privacy legislation does not change this obligation. Where the subpoena has been initiated by the patient or their legal representative privilege does not apply. The patient or their lawyer has first access to the material. A provider with serious concerns about the patient having access to the material might alert the patient's lawyer to that fact, allowing the lawyer to discuss the matter with the patient. If the patient is unrepresented the provider might discuss the matter in advance with the patient, or consider the use of an intermediary.

Where the subpoena has been issued by a third party, the provider, as a matter or courtesy should notify the patient or their legal representative of that fact, of any material that might attract privilege, and of any material that if seen by the patient might cause harm to them or any other person. Court procedures cater for privilege claims to be made before a third party is granted access.

So long as the provider has acted in accordance with best clinical and ethical practice, they can assume that the legal process provides sufficient protection to themselves and the patient.

Does complying with the privacy legislation expose a provider to risk of legal suit?

Hopefully, our previous discussion has indicated that generally, compliance with privacy legislation does not have to be onerous, and may in fact enhance good clinical practice. However, a provider's concern about this is understandable, particularly in the context of an adversarial legal environment.

The legislation exempts providers from providing patient access to their personal information where that access would pose 'a serious threat' to the life or health of any person. This means that providers (unless another exemption applies) are obliged to provide access to a patient where harm, something less than a 'serious threat' to the patient's life or health, might occur.

It is therefore important that providers put their mind to the nature and degree of harm that might arise from a patient having access to their notes. They should consider discussing the matter with the patient, with a view to arriving at a form of access that is more appropriate. They must also note clearly where legitimate restrictions to access apply so that, if the patient goes to another member of the treating team to access the information, those others who hold the information are alerted to the situation.

In the long term, the Coalition wishes to gain a clarity about the true meaning in mental health terms, of the terms 'serious threat' and 'serious and imminent threat'. We will continue to discuss these issues with the Privacy Commissioner's Office.

MEDIA

Do any restrictions apply to the media in relation to the release of details of the diagnosis and treatment and care of mental health patients?

Providers, by force of the law, might be obliged to release information about a patient to the police. They then lose control over what of that information reaches and is disclosed by the media. The media is exempt from the privacy law and this is a matter of concern expressed by patients, their carers and providers.

The Coalition intends to make a submission concerning this matter when the privacy legislation is reviewed in 2004. Providers can assist by providing their representative bodies, with any evidence of harm resulting from the media not being subject to the privacy legislation.

OTHER ISSUES

How can providers utilise the privacy legislation to strengthen best practice?

An example of how this can be done is by providers explaining to patients the need for family and carers to be involved in their treatment and care, where necessary. This might need to be appropriately qualified in order to reassure the patient that their right to confidentiality will be respected.

Patients should be asked about this in a way that the answer is not suggestive to either include or exclude family and carers.

Providers are relied on to advise patients on issues of confidentiality and when it is appropriate to share sensitive information with others.

What is the difference between confidentiality and privacy?

Provider and patient confidentiality forms part of privacy, but privacy is a wider concept that takes account of the patient's right to know how their health information is being handled and in general to have access to the information held about them.

WORKING WITH THE EXISTING PRIVACY LEGISLATION

A carefully prepared document can assist in the communication process with patients about the way in which, in the interest of their health and the maintenance of a therapeutic relationship, you intend to handle their information. If an holistic approach is to be taken, this can be explained. A brochure can be handed to patients when they first meet the clinician, which might allow a less formal oral discussion about your information handling policies.

It is important that providers:

- discuss with their patients their concerns about patient access to material, other than factual material, and that it might interfere with the therapeutic relationship or impede the therapeutic process
- do not let their concerns over this matter interfere with the way in which they need to take notes in the course of providing therapeutic care and are aware that access to notes can be restricted where the provider's own privacy, or that of third parties might be infringed; and
- formulate privacy policies, which cover;
    - the way they work;
    - the situations where they believe it would not be in the patient's best interest to access notes;
    - the information they are happy to provide access to; and
    - the way in which information will be provided (e.g. summary report rather than copies of notes)
- have their privacy policy available for patients in a patient information pamphlet or some other written form.

PRIVACY KIT Part 4

Patient Information Pamphlet

In the interests of providing quality health care a privacy policy has been developed that complies with the privacy legislation and the NPPs upon which provider organizations may wish to build. An organisation's privacy policy should be developed to suit the individual needs of the particular organization or provider:

It is important that individual providers ensure that their information handling policies are aligned with;

- the needs of their patients and their carers
- the manner in which they practice; and
- the privacy legislation.

The patient information pamphlet in this kit is for guidance only as to the type of privacy policy providers might adopt.

SAMPLE

OUR PRIVACY POLICY: YOUR PEACE OF MIND

Our policy is developed to suit your health care needs and the delivery of services that we offer you.

The provision of quality health care is our principle concern. It requires a therapeutic relationship of trust and confidentiality. Your mental health service provider regards patient health information as confidential and will generally collect this information with patient consent.

A patient's personal information is handled in accordance with this provider's privacy policy and consistent with the privacy legislation. Patients are entitled to know what personal information is held about them; how and under what circumstances they may have access to it; why it is held; its use; to whom and under what circumstances it may be disclosed; when consent is required for these purposes; and how it is stored.

Every effort will be made to discuss these matters with patients at the time personal health information is collected from patients attending this provider. Because there will be occasions when it is not practicable to make patients aware of these matters at the time of collection, this brochure is designed to outline how this service provider endeavours to protect the privacy of patients' personal health information.

Collection, Use and Disclosure of your information

The same rules apply to your record, whether it is held by medical practitioners or service providers (i.e. hospitals).

Information about a patient's medical and family health history is needed to provide accurate medical diagnoses and appropriate treatment. We will be fair in the way we collect information about our patients. This information will generally be collected with patient consent. However, from time-to-time we may receive patient information from their carers and key family members amongst others. When this occurs we will, wherever possible, make sure the patient knows we have received this information.

We acknowledge that family members and carers have legitimate concerns about the patient's health care. We will discuss with the patient the benefits of sharing information where appropriate, with the patient's preferred family members and carers. The sharing of this information requires the patient's consent.

Mental health care requires full knowledge of patient health information by all members of the treating team. To ensure quality and continuity of patient care, a patient's health information has to be shared with other health care providers from time to time. Some information about patients is also provided to Medicare, and private health insurance funds if relevant, for billing and medical rebate purposes.

Mental health service providers in this facility are members of various medical and professional bodies including medical defence organisations. In addition, all private hospitals are required to hold professional indemnity (medical malpractice) insurance. There may be occasions when disclosure of patient information is required for medical defence purposes.

There are also circumstances where, for example, a medical practitioner (or service provider) is legally bound to disclose personal information. An example of this is the mandatory reporting of communicable diseases.

It is necessary for us to keep patients' information after their last attendance at this practice for as long as is required by law or is prudent having regard to administrative requirements.

Access

The same rules apply to your record, whether it is held by medical practitioners or service providers (i.e. hospitals).

In the course of providing mental health care your treating provider is likely to record not only factual material, but also their personal thoughts and comments that arise out of the therapeutic session. A patient generally has a right to access their health information. In the interests of maintaining the therapeutic relationship between you and your treating provider, it may be necessary to discuss with you restrictions on your access to these personal thoughts and comments. We are happy to discuss with you the nature and manner of access by you to your personal information. Carer or key family member's access to your personal information is in strict accordance with special criteria, please ask if you would like more information about this. You do not have to let us know why you require access to your information, but we may need to clarify the scope of your request so that an appropriate form of access can be provided.

There are some circumstances in which access may be denied, for example where the access poses a serious threat to the life or health of a person, but in such an event we will let you know the reason. Occasionally, access to the notes may interfere with the therapeutic process, and pose a serious threat to your health as a result.

If a patient finds that the information held on them is not accurate or complete, the patient may request to have that information amended. The mental health service provider will take reasonable steps to correct the information. The provider would generally attach comments to the record noting the corrected information rather than permanently erasing details from the health record.

Upon request a patient's health information held by mental health service providers will be made available to another health service provider.

Parents/Guardians and Children

The right of children to privacy of their health information, based on the professional judgement of the provider and consistent with the law, might at times restrict access to this information by parents or guardians. On the other hand, we might suggest that the child or young adult involve their parent or guardian in decisions as to how their health information will be handled.

Complaints

It is important to us that your expectations about the way in which we handle your information are the same as ours.

Please do not hesitate to discuss any concerns, questions or complaints about any issues related to the privacy of your personal information with your provider.

If you are still dissatisfied you can complain to the Federal Privacy Commissioner whose contact details are:

The Federal Privacy Commissioner
Level 8 Piccadilly Tower
133 Castlereagh Street
Sydney NSW 2000
GPO Box 5218
Sydney NSW 2000

Privacy Hotline: 1300 363 992
Website: www.privacy.gov.au

Further information

Further information about an individual's privacy rights can be obtained from the Office of the Federal Privacy Commissioner at the above address.

Understanding Privacy - The NPPs at a Glance

NPP 1 - Collection

This principle sets out what a person has to be told at, or as soon as practicable after, information is collected about them. As applied to a doctor or any provider of a health service, in taking a full history, or any other information, NPP 1 requires that:

- Collection of personal information must be necessary, fair, lawful and not intrusive.
- Reasonable steps must be taken to ensure a person is told the organisation's name, the purpose of the collection, usual disclosures, and
- That the person can get access to their personal information; and
- What the consequences are if the person does not provide the information asked of them, and
- Any law that requires the information to be collected.

NPP 1 has to be read by providers in conjunction with NPP 10 that deals with sensitive information (see below).

NPP 2 - Use and Disclosure

A patient's personal health information is to be used or disclosed for the 'primary' purpose of the collection, or for secondary purposes, that is for purposes directly related to the primary purpose, and as to which the individual would reasonably expect it to be handled. This means that generally personal health information can be used and disclosed only for purposes directly related to the individual's health care and in ways that are consistent with a patient's expectations. Otherwise specific consent will generally be required.

Other uses and disclosures in the interests of the highest quality and continuity of health care may include sharing information with other health care providers who comprise the patient's medical team from time-to-time, as well as carers and key family members. In addition, there are circumstances when information may be disclosed without patient consent, such as:

- Emergency situations.
- By law, doctors are sometimes required to disclose information for public interest reasons, e.g. mandatory reporting of some communicable diseases.

- It may be necessary to disclose information about a patient to fulfill a medical indemnity insurance obligation.
- Provision of information to Medicare or private health funds, if relevant, for billing and medical rebate purposes.

In general a patient's health information will not be used for any other purposes without their consent. There are some necessary purposes of collection for which information will be used beyond providing health care, such as professional accreditation, quality assessments, clinical auditing, billing and so forth.

NPP 3 - Data quality

All patient information held is to be maintained in a form that is accurate, complete and up to date.

NPP 4 - Data security

The storage, use and, where necessary, transfer of personal health information is to be undertaken in a secure manner that protects patient privacy. It is necessary for health care providers to keep patient information after a patient's last attendance for as long as is required by law or is prudent having regard to administrative requirements.

NPP 5 - Openness

An organization must set out in a document clearly expressed policies on its management of personal information. The document must be made available to anyone who asks for it. In addition, on request by a person, an organization must take reasonable steps to let the person know, generally, what sort of personal information it holds, for what purposes, and how it collects, holds, uses and discloses the information.

NPP 6 - Access and correction

Patients may request access to their personal health information held by an organisation.

- Where necessary, patients will be given the opportunity to amend any personal information held that is incorrect.
- There are some circumstances in which access can be restricted, and in these cases reasons for denying access are to be given.
- Reasonable, but not excessive, charges may be made where costs are incurred in providing access.
- The right of children to privacy of their health information should be acknowledged. Based on the professional judgement of the provider and consistent with the law, it might at times be necessary to restrict access to personal health information by parents and guardians. Upon

request a patient's health information held by an organization should be made available to another health service provider.

NPP 7 - Identifiers

These are the numbers, letters or symbols that are used to identify patients with or without the use of a name (e.g. Medicare numbers). Organisations should limit the use of identifiers assigned to patients by Commonwealth Government agencies to those uses necessary to fulfill the obligations to those agencies.

NPP 8 - Anonymity

A patient has a right to be dealt with anonymously, provided this is lawful and practicable or possible for Medicare and insurance rebate purposes. It should be noted that this could also be dangerous to the patient's health.

NPP 9 - Transborder data flows

Individual privacy is protected Australia-wide by privacy laws. Organisations should take steps to protect patient privacy if information from being sent interstate or outside Australia.

NPP 10 - Sensitive Information

Health information is 'sensitive information' for the purposes of privacy legislation. This means that generally patients' consent has to be obtained to collect health information that is necessary to make an accurate medical diagnosis, prescribe appropriate treatment and to be proactive in patient health care. Health information can be collected without consent in emergency situations, if required by law, or if necessary to establish a legal claim.

Some Definitions

Sensitive information means information or an opinion about a person's racial or ethnic origin, political opinions, membership of a political, professional or trade association or trade union, religious beliefs or affiliations, philosophical beliefs, sexual preferences or practices, or criminal record, as well as health information about the person.

Health information includes personal information collected to provide, or in providing, a health service.

Personal information means information or an opinion, including information or an opinion forming part of a database, "whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion". This means that consent of the individual is required before any personal, sensitive or health information is collected in the course of providing a health service.

Further Resources

Electronic data security is an imperative and providers are urged to access the General Practitioners Computing Group's "*IT Security Guidelines for General Practitioner*" at: www.gpcg.org.

Other Resources

- The Office of the Federal Privacy Commissioner's Guidelines on *Privacy in the Private Health Sector* (www.privacy.gov.au)
- The AMA's *Privacy Resource Kit* (http://www.ama.com.au)
- The APHA/Private Hospitals Association of Queensland (PHAQ) *Privacy Kit* (http://www.phaq.org).

AMA

THE ROYAL
AUSTRALIAN AND NEW ZEALAND
COLLEGE OF PSYCHIATRISTS

MENTAL
HEALTH
COUNCIL OF
AUSTRALIA

Australian
Private Hospitals
Association