



Epworth HealthCare

Excellence, Everywhere, Every Day

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4 July 2012

Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitution Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: LegCon.Sen@aph.gov.au

Dear Ms Dennett

Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

Thank you for inviting Epworth Foundation to make a submission to this parliamentary inquiry. I note that the Bill amends the *Privacy Act 1988* to implement some of the recommendations of the Australian Law Reform Commission including the creation of the *Australian Privacy Principles*, more comprehensive credit reporting, with improved privacy protection, the introduction of new provisions on privacy codes and the credit reporting code and clarification the functions and powers of the Information Commissioner.

I note that the Bill amends the *Privacy Act* to create the Australian Privacy Principles- a single set of privacy Principles applying to both Commonwealth agencies and private sector organisations (such as Epworth Foundation which is incorporated in Victoria under its own Act of Parliament).

These Australian Privacy Principles (APPs) will replace the National Privacy Principles under which Epworth currently operates (in addition to the *Health Privacy Principles* set out under the Victorian *Health Records Act*).

Epworth remains concerned that it must comply with any APPs as well as the Health Privacy Principles under Victorian legislation. This remains confusing even though the principles are similar. The *Health Records Act* applies to health informationⁱ in the private sector whereas the Bill purports to deal with the new definition of *personal information*.

I note that there will be a transition period during which privacy codes may be developed.

I note too, that where collection is required or authorised "*under an Australian law*" (other than the Act) this will be lawful-a *permitted health situation*.ⁱⁱ

Epworth HealthCare comprises:

Epworth Corporate
Epworth Medical Foundation

Epworth Richmond

Epworth Eastern

Epworth Freemasons
Victoria Parade
Clarendon Street

Epworth Rehabilitation
Richmond
Brighton
Camberwell

I note that, for example, under proposed Australian Privacy Principle 3.1 an agency must not collect *personal information* unless the information is reasonable necessary for or directly related to, one or more of the entity's functions or activities. Epworth collects personal information, as well as *health information*, for the purpose of carrying out its functions as a healthcare organisation.

APP 3.3 will provide for the collection of *sensitive information* which is a subset of *personal information*.

I note that the definition of *sensitive information* in subsection 6 (1) of the *Privacy Act* includes biometric information and biometric templates.

I note the general rule is that sensitive information can only be collected where the collection meets the criteria, and where the individual has consented to the collection. There are exceptions to this general rule in APP 3.4, and these have been included to enable a collection of *sensitive information* without consent where it is in the public interest to do so.

It is an exception for a *not for profit organisation* to collect sensitive information without consent, if it relates to the activities of the organisation, and the information relates solely to the members of the organisation or to individuals who have regular contact with the organisation in connection with its activities. What does this mean for a healthcare organisation like Epworth Foundation which is currently regarded as a not for profit organisation?

The Bill defines a *non profit organisation* as one that engages in activities for *cultural recreational political religious philosophical professional trade or trade union purposes* but not a not for profit health care organisationⁱⁱⁱ

I note too, the definition of *responsible person* to be inserted by new section 6AA.

This is to be contrasted with the concept of *person responsible* under current guardianship laws in Victoria –very confusing for health care providers. There is, for example, no role for a *carer* but rather one who has an "*intimate personal relationship with the individual*"^{iv}-what does that connote?

Epworth supports the general thrust of the proposed APPs to enhance the integrity of personal information.

It is important to remember however that whilst a patient may choose anonymity in dealing with a Hospital it remains important that their health information is accessible for safety and quality reasons and that this right not be absolute^v

Also, being not for profit Epworth is dependent on donations and the ability to fundraise. It would wish to collect personal information and be permitted to solicit donations. We submit that this is reasonable necessary for the functions and activities of a private not for profit hospital. See our comments about the definition of a *non profit organisation* above.

Query whether a patient would reasonably expect Epworth to use or disclose information for this secondary purpose. What is meant by a "*permitted general situation*"?^{vi}

We note the prohibition on *direct marketing*^{vii} We would always seek to endeavour that patients may request that they not receive direct marketing communications from Epworth-but that this would be an opt out situation not an opt in.

Finally we note that APP12 provides access to personal information on request of the individual. Again we point out that the *Health Records Act* and *Freedom of Information Act* in Victoria provide a form of access to information held by Epworth about its patients.

The exceptions in APP 12.3 proposed are slightly different from the exceptions contained in applicable Victorian law-see for example s 141 (3) of the *Health Services Act* 1988 (Vic)

Likewise the ability to correct personal information ^{viii} is different from s. 39 of the *FOI Act* (Vic) viz

Where a document containing information relating to the personal affairs of a person (including a deceased person) is released to the person who is the subject of that information (or in the case of a deceased person, that

person's next-of-kin) that person shall be entitled to request the correction or amendment of any part of that information where it is inaccurate, incomplete, out of date, or where it would give a misleading impression.

It is submitted that these differences may prove a difficulty for health care organisations falling under the Commonwealth regime as well as State legislation on the same topic.

Please contact me should you require a further more detailed response. My direct line is
and my email is

Yours sincerely

Elizabeth Kennedy
Corporate Counsel

ⁱ see s 11

ⁱⁱ see s 16B

ⁱⁱⁱ see s 31 of the Bill and propose new sub section 6(1)

^{iv} See s 6AA (1) (g)

^v see APP 2

^{vi} See APP 6.2 (c)

^{vii} APP 7

^{viii} APP 13