

Senate Community Affairs Committee
ANSWERS TO QUESTIONS ON NOTICE
HEALTH AND AGEING PORTFOLIO
INQUIRY INTO COMPLIANCE AUDITS

6 May 2009 Question: 3

OUTCOME 3: Access to Medical Services

Topic: PENALTIES FOR BREACHES OF SECRECY PROVISIONS

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SENATOR MOORE asked: to be provided with detail on privacy issues within the Australian Public Service (APS), penalties associated with breach of privacy as well as information on the quality of bureaucrats and the integrity of the APS.

Mr Learmonth – We will provide you with a complete profile on the legislative framework that we are subject to. There are specific provisions in the Health Insurance Act, the Privacy Act and the Public Service Act. I note for the record that we are all subject to these, regardless of our respective professions. We will provide that to you on notice, Senator.

Answer:

The use of information acquired in the course of employment in the Australian Public Service (APS) is highly regulated. All APS employees are required by the Public Service Act 1999 (the PS Act) to uphold the APS Values and Code of Conduct at all times. The Code is a public legal statement of the minimum standards of behaviour and conduct mandated for individuals who work in the APS. The prescribed behaviours in the Code relate to:

- honesty and integrity;
- care and diligence;
- respect and courtesy;
- upholding the law;
- confidentiality;
- conflicts of interest;
- use of Commonwealth resources;
- provision of information; and
- behaviour in Australia and overseas.

The Australian Public Service Commissioner is responsible for monitoring and reporting to Parliament on the extent to which agencies uphold the APS Values and on the adequacy of their systems and procedures to ensure compliance with the Code.

Australian Public Service employees are also bound by the Information Privacy Principles (IPPs) set out in the *Privacy Act 1988*. The IPPs regulate the way that APS agencies manage information including the collection of personal information; the storage, security and access to that information; and the use and disclosure of personal information.

Section 2.1 of the *Public Service Regulations 1999* (the Regulations) provide that an employee must not disclose information obtained in the course of their employment *whether or not*¹ the disclosure would constitute a breach of confidence (unless the disclosure is authorised by law).

There are serious consequences for any breach of the PS Act including termination of employment, demotion, re-assignment of duties and/or reduction in salary. In addition, the conduct that might lead an officer to be in breach of the Code or the Regulations may possibly be an offence under section 70 of the *Crimes Act 1914*. The penalty is imprisonment for two years.

The *Health Insurance Act 1973* (HIA) contains additional provisions relating to the use and disclosure of health information collected in the course of administering the health programs. Section 130 of the HIA:

- prohibits APS employees from giving out personal information to any other person, except in the performance of their statutory duties and functions [s.130(1)];
- Section 130 (1) also relates to a person after he or she ceases to be an officer; and
- Section 130 (2) prevents an APS employee from being required to divulge information or documents acquired as a result of the performance of their duties to a court unless for the purposes of the HIA.

Under section 130 of the HIA, there are a range of possible penalties and offences. The penalties are commensurate with the seriousness of the breach. For example, a penalty of \$500 applies to a Medicare Australia (MA) officer who breaches section 130 (1) referred to above. For the most serious breaches under section 130, the penalty is imprisonment for up to two years [see section 130 (23)]. An example would be section 130 (14) when a person solicits protected information from an officer or another person which would be in contravention of section 130 and the first mentioned person knows or ought to know that the information is protected information. The first mentioned person is guilty of an offence irrespective of whether any protected information is actually disclosed.

There are some legislative exceptions which enable disclosures to occur for non-Medicare purposes:

- Under section 130 (3A)(a) if the Minister certifies that the disclosure is appropriate the Secretary or the Medicare CEO may divulge certain information. Information may only be divulged where it is in the public interest, such as a serious criminal investigation or where there is a risk of serious harm to the health or welfare of a person;
- Under section 130 (3A)(c) information may be divulged to a person to whom the information relates who, in the opinion of the Minister has authorised the divulging;
- to a prescribed authority or person, for example, prescribed officers of the Department of Veterans' Affairs, the NSW Health Care Complaints Commission and Medical Boards of all States and Territories [section 130 (3A) and reg 27 of the HI Regulations];
- use by a professional disciplinary body [ss.130(4A)]; or
- to a person, where the person provided it to MA or where the information relates to that person [ss.130(4A)].

In the scenarios described above, under section 130 (4) of the HIA, where the information is disclosed under s.130(3) or (3A) the obligations of sections 130(1) and (2) that is, those above, also apply to the person or authority to whom information is divulged.

¹ Emphasis added

The *National Health Act 1953* provides for the Privacy Commissioner to issue written Privacy Guidelines relating to health information obtained in connection with a claim for payment of a benefit under Medicare or the Pharmaceutical Benefits Program (section 135AA). A breach of the Privacy Guidelines may be investigated by the Privacy Commissioner who may make recommendations to an agency which include payment of compensation and necessary action to remedy or reduce loss or damage. If the Commissioner is not satisfied with the steps taken by the agency, or if there is a public interest issue, a further report may be tabled in Parliament.

A breach of the Guidelines by a MA officer may lead to that officer being investigated for possible breach of the Code under the PS Act and if found to have breached the Code to be subject to disciplinary action up to and including dismissal.

Attached are copies of the relevant pieces of legislation and Guidelines governing conduct in relation to information acquired in the course of administering health programs.