



Australian Government

Office of the Privacy Commissioner

Inquiry into the National Registration and Accreditation Scheme for Doctors and other Health Workers

Submission to the Senate Community Affairs Committee

July 2009

Key Recommendations

The Office supports the development of a National Registration and Accreditation Scheme for the health professions. The Office acknowledges that this scheme aims to protect and respect practitioners' and students' privacy through sound information-handling practices, while maintaining high quality and safety standards throughout the health sector.

The Office's key recommendations on the exposure draft of the *Health Practitioner Regulation National Law 2009* (Bill B) (the exposure draft Bill) are as follows:

1. The Office supports the intention to apply the privacy protections in the Privacy Act to the scheme.
2. The Office understands that, under the 'applied laws' model being used for the scheme, the content of the NPPs (modified as appropriate) will be the basis of the privacy protections in the law which will be applied by each participating jurisdiction to the scheme.
3. The Office supports the additional specific protections in the exposure draft Bill around the use of information from the public registers and through the confidentiality provisions.
4. The Office suggests the exposure draft Bill could benefit from the inclusion of more detail on the entities and the acts and practices of those entities to which the privacy protections will apply.
5. Where changes to the protections that currently apply under the Privacy Act are proposed through regulations the Office suggests that consideration be given to requiring consultation with the Office and state/territory Privacy Commissioners on those proposed regulations.
6. The Office suggests that an alternative name to the proposed "National Health Practitioners' Privacy Commissioner", could be considered to reduce any potential confusion about the role of the Commissioner.
7. The Office also submits that the appointment of a single Commissioner to cover all jurisdictions (such as the current Australian Privacy Commissioner) would be in keeping with the national nature of the scheme.
8. The Office also suggests that, in relation to the provisions within the exposure draft Bill allowing personal information to be disclosed to other entities it may be appropriate to include in the exposure draft Bill a provision for oversight of these disclosures, for example by reporting numbers, types and recipients of disclosures to the Australian Health Workforce Advisory Council on an annual basis.

The Office has also made a number of other suggestions in relation to the detailed provisions of the exposure draft Bill in this submission.

Office of the Privacy Commissioner

1. The Office of the Privacy Commissioner (the Office) is an independent statutory body responsible for promoting an Australian culture that respects privacy. The Office, established under the *Privacy Act 1988* (Cth) ('the Privacy Act'), has responsibilities for the protection of individuals' personal information that is handled by Australian and ACT government agencies, and personal information held by all large private sector organisations, health service providers and some small businesses. The Office also has responsibilities under the Privacy Act in relation to credit worthiness information held by credit reporting agencies and credit providers, and personal tax file numbers used by individuals and organisations.

Background

2. The Office appreciates the opportunity to provide comments to the Senate Community Affairs Committee on the exposure draft *Health Practitioner Regulation National Law Bill 2009* (known as Bill B)¹, as part of the Committee's Inquiry into the *National and Registration and Accreditation Scheme for Doctors and other Health Workers*². The Office's comments follow its earlier (April 2009) submission³ to this inquiry.
3. The Office supports the development of a National Registration and Accreditation Scheme for the health professions ('the scheme'). The Office acknowledges that this scheme aims to protect and respect practitioners' and students' privacy through sound information-handling practices, while maintaining high quality and safety standards throughout the health sector.
4. The Office is pleased to provide comment to the Senate Community Affairs Committee on the exposure draft of the *Health Practitioner Regulation National Law 2009* (Bill B) ('the exposure draft Bill') prior to its introduction into the Queensland Parliament and subsequent introduction into all parliaments across Australia.
5. The Office notes that the exposure draft Bill is a result of extensive consultation with consumers, practitioners and regulatory bodies on the consultation papers issued in 2008. The Office made a submission in December 2008 on the Consultation Paper on *Proposed arrangements for information sharing and privacy*⁴. That paper, one of several consultation papers, was of particular relevance to the Privacy Commissioner's role and responsibilities for promoting and protecting privacy in Australia.
6. The Office attended the National Forum on the exposure draft Bill held in Canberra on 19 June 2009 and supports ongoing opportunities for public consultation as the scheme develops.

¹ <http://www.nhwt.gov.au/natreg.asp>

² http://www.aph.gov.au/Senate/Committee/clac_ctte/registration_accreditation_scheme/index.htm

³ Available at http://www.privacy.gov.au/publications/sub_national_registration_accreditation.pdf

⁴ Available at www.nhwt.gov.au/natreg.asp.

Key Issues

The privacy regime

7. The Office supports the intention to apply the privacy protections in the Privacy Act to the scheme. It notes the statement in the Australian Health Workforce Ministerial Council Communique of 8 May 2009 to this effect, with specific reference to adoption of the Privacy Act's National Privacy Principles (NPPs).
8. Reliance on the privacy protections in the Privacy Act is in line with the key themes of national consistency and reduced fragmentation in privacy law promoted in the Office's submissions to the Australian Law Reform Commission (ALRC) review of privacy laws and in line with the recommendations in the ALRC's Report 108 For Your Information: Australian Privacy Law and Practice⁵.
9. Where additional, specific protections are needed beyond the principles-based standards of the NPPs, the Office supports the protections in the exposure draft Bill around the use of information from the public registers and through the confidentiality provisions.
10. The Office supports the protections in the exposure draft Bill in relation to disclosures to Commonwealth agencies. It notes that, prior to any legislative change arising from the ALRC report, Commonwealth agencies remain bound by the Information Privacy Principles (IPPs), as well as any additional legislative requirements such as secrecy provisions, with regard to their handling of personal information.

Breadth of the Scheme

11. The Office understands that, under the 'applied laws' model being used for the scheme, the content of the NPPs (modified as appropriate) will be the basis of the privacy protections in the law which will be applied by each participating jurisdiction to the scheme.
12. However, the Office suggests that the exposure draft Bill could make clearer the potential breadth of the coverage of the privacy protections in relation to the scheme.
13. The Privacy Act and other state and territory privacy legislation generally apply to specific entities and to specific acts and practices of those entities. The exposure draft Bill would benefit from the inclusion of more detail on the entities and the acts and practices of those entities to which the privacy protections will apply.
14. The Office notes that it may be the intention to clarify this scope through regulations. However the Office suggests that clarifying the issue in the primary legislation may be preferable.

⁵ See the Office of the Privacy Commissioner's ALRC Inquiry page at www.privacy.gov.au/act/alrc/index.html and the ALRC's Report at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/>

Regulations

15. Where changes to the protections that currently apply under the Privacy Act are proposed through regulations the Office suggests that consideration be given to requiring consultation with the Office and state/territory Privacy Commissioners on those proposed regulations.

The National Health Practitioners' Privacy Commissioner

16. The Office suggests that an alternative name to the proposed "National Health Practitioners' Privacy Commissioner", would be preferable. The Office considers that use of the proposed name could lead to confusion about the role of the commissioner. For example, many individuals might mistakenly direct queries about much wider issues, including alleged breaches of privacy in relation to their personal information handled by health practitioners, to the Commissioner.
17. The Office also submits that the appointment of a single Commissioner to cover all jurisdictions (such as the current Australian Privacy Commissioner) would be in keeping with the national nature of the scheme⁶.
18. The Office considers that the exposure draft Bill would also benefit from including further details on the appointment of the Commissioner (including responsibility for the appointment); the role, powers and functions of the commissioner; and administrative arrangements, including support.

Duty of confidentiality

19. The Office supports the prohibitions on improper disclosures of 'protected information' (Clause 262). The Office notes that, in addition to the exemptions listed under 262 (2), additional limitations and protections apply in regard to the handling of personal information under the Privacy Act. The Office suggests that the exposure draft Bill include a note to the effect that the Privacy Act protections apply in addition to the specific privacy measures in the exposure draft Bill.

Disclosures of information: for workforce planning; for information management and communication purposes; to Commonwealth, State and Territory agencies

20. The Office supports the non-mandatory requirement for provision of information for workforce planning by health practitioners. The Office submits that encouraging provision of the information on the basis of goodwill and recognition of the usefulness of such information by health practitioners is a useful approach.

⁶ It should be noted that using the Australian Privacy Commissioner for this role would require some amendments to the Privacy Act.

21. The Office also supports the provision of workforce planning information in a way that does not identify individual practitioners. This will ensure that privacy issues are minimised.
22. The Office supports the protections around disclosure of information for information management and communication purposes, especially Clauses 264 ((2) (a) and (b) and the protections in Clause 265 (2) regarding disclosures to government entities.
23. The Office suggests that good privacy practice would be to ensure that health practitioners receive notice, for example, at the time of registration or on renewal of registration, about the purposes for which registrants' information might be used and disclosed. The Office submits that consideration could be given to including a suitable form of notice in the regulations.
24. The Office also suggests that in relation to the provisions within the exposure draft Bill allowing personal information to be disclosed to other entities it may be appropriate to include in the exposure draft Bill a provision for oversight of these disclosures. This could be done, for example, by reporting numbers, types and recipients of disclosures on an annual basis to the Australian Health Workforce Advisory Council. The Office suggests that this would assist in making sure that the disclosure of personal information remains relevant to the scope and intentions of the scheme.

Other comments on specific provisions

Criminal history law (Part 1, 6, p.4: Definitions; Part 7, Subdivision 5, 147 (4), p 73)

25. The Office welcomes the provision as set out in Clause 147 (4) that excludes 'spent or other convictions'⁷ from a person's criminal history in regard to requests for written reports about a registered health practitioner's criminal history.
26. The Office submits that consideration could be given to including in the regulations details of whether and how criminal history information might be stored in the registers, once checked. For example, a 'Yes' response regarding any serious offences committed over the relevant timeframe could prompt further investigation, but not necessarily require storage of the information in the registers.

Trans-Tasman mutual recognition principle (Clause 9)

27. The Office supports this provision and notes that consideration could be given to including more specific arrangements between Australian and NZ authorities (in addition to the baseline requirements of NPP9) in either the exposure draft Bill or the regulations.

⁷ Criminal history law means a law of a participating jurisdiction that provides that spent or other convictions do not form part of a person's criminal history and prevents or does not require the disclosure of those convictions.

28. The Office submits that the regulations could include clarification regarding the application of the NPPs, as modified, and the handling of complaints, in relation to this Clause and Clause 8.

Duty of confidentiality (Clause 262)

29. The Office notes that some of the wording in Clauses 262 is not consistent with the Privacy Act. The Office makes the following specific comments:

- Clause 262 (2) (c) - the wording 'required or permitted by law' differs from the Privacy Act's 'required or authorised by law'. The proposed wording could be seen as more permissive and consideration might be given to aligning the wording with the Privacy Act.
- Clause 262 (2) (d) - the word 'agreement' differs from the word 'consent' that occurs in the Privacy Act and other guidelines (for example National Health and Medical Research Council guidelines). For consistency, consideration might be given to the use of 'consent' rather than 'agreement'.
- Clause 262 (2) (e) The Office submits that it may be useful to consider the addition of words similar to those in the Privacy Act to define personal information, for example, where identity 'cannot be reasonably ascertained'⁸.
- Clause 262 (2) (g) The Office submits that to ensure the intent of the sub-clause and so that disclosure of incorrect information unintentionally published in a National Register does not occur, consideration might be given to amending the wording from 'accessible to the public, including, because it is or was recorded in a National Register' to 'accessible in an authorised manner', or 'for the appropriate purpose of making public'.

Disclosure of information for workforce planning (Clause 263)

30. The Office supports the prohibition on workforce planning information gathered by National Boards and which identifies an individual being used for any secondary purpose (263 (4) (b)). The Office suggests that the words 'or disclosure' be added after 'use'. This reflects the Privacy Act's distinction between use and disclosure and seeks to make sure that the section clearly covers disclosure of the information outside the National Board.

Disclosure of information for information management and communication purposes (Clauses 242 and 245)

31. The Office submits that it would be useful to clarify further what is meant by 'information management agency' (Clause 264 (4)) and that it may be

⁸ The *Privacy Act 1988* (Cwth): Part II – Interpretation available at <http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/98DF083E9BFEA5CBCA2575C500021052?OpenDocument>

useful to identify other such agencies. For example, would the term include agencies listed in Clause 265? Would the Office qualify as an 'information management agency'? Would agencies such as the Australian Institute of Health and Welfare, or the National Health and Medical Research Council qualify?

32. The Office submits that the phrase 'ensures the privacy of the persons to whom it relates is protected' in Clause 264 (2) could be rephrased to clarify the intent, using wording similar to that used in the Privacy Act. For example, 'ensures the identity of the person to whom it relates is protected' or 'ensures the identity of the person cannot be reasonably ascertained'. In a similar way, use of such wording might clarify the intent of Clause 263 (4) (b).
33. The Office submits that the addition of wording such as 'or otherwise handled' to the words "collected, stored and used" in Clauses 264 (2) (a) and 265 (2) (a) might be considered, to cover all possible information handling practices.

*Disclosure to protect health or safety of patients or other persons
(Clause 267)*

34. The Office supports the intent of Clause 267. However, the Office suggests that it may be appropriate to include a provision for registrants to be notified of a disclosure of their personal information under the clause, whether at the time of the disclosure or at a later time if that is considered appropriate to meet the intent of the section to protect the health and safety of others.
35. The Office notes that the exposure draft Bill does not define the level of 'risk' under which disclosures to protect health or safety of patients and others may be made. The Office suggests that it may be appropriate to include a definition either in the exposure draft Bill, or the regulations, to clarify the threshold in regard to the seriousness of risk before a disclosure is made.

Information to be recorded in registers (Clause 271)

36. The Office supports the limits on information to be included in registers (for example, postcode and suburb only, not full postal address). The Office submits that consideration could be given to an express statement that the registers should record only the information listed in the clause.
37. The Office submits that, while it is appropriate to record the fact that a practitioner's registration has been cancelled by a responsible tribunal (Clause 271 (3) (a)), consideration could be given to whether it is necessary to record the details of conduct that led to the cancellation of a practitioner's registration (Clause 271 (3) (c)).
38. The Office also suggests that a provision regarding removal of information about cancelled registrations could be appropriate. For example, the Privacy Act requires destruction or de-identification when information is no longer needed (clause 271 (3)).

Exclusion of certain information in the register (Clause 272)

39. The Office agrees that, in the interests of practitioners' privacy, a condition(s) imposed on registration or details of an undertaking(s) due to a practitioner's impairment may not be appropriate to disclose on a register, subject to public interest and public safety. For example, information that is relevant to employers (or potential employers) only should not be publicly displayed and could be communicated to employers by other means.
40. The Office notes that under the Privacy Act any disclosure of sensitive information (including health information) without consent can only be done if one of a number of limited exceptions apply. In relation to clause 272(1)(a) it may be useful for the regulations to set out criteria for what constitutes 'protecting a practitioner's privacy'.
41. The Office further submits that where disclosure of a condition(s) or details of an undertaking(s) by a practitioner are appropriate care should be taken in phrasing the relevant work restrictions to avoid, as far as practicable, revealing the health or other sensitive information of the practitioner.

Inspection of registers (Clause 273)

42. The Office submits that it would be appropriate for the exposure draft Bill to include clarification regarding the purposes for which inspection of the registers would be permitted.
43. The Office supports the intention to apply a public interest test to the provision of a copy of a whole register (Clause 273 (2)). However, the Office suggests that the intent of the provision may be compromised by providing extracts, under Clause 273 (1) (b), which may, in total, comprise a copy of a whole register.
44. The Office submits that it would be appropriate to specify enforceable and auditable protections around the collection, subsequent use and disclosure, of information derived from a register. For example, protections might include prohibition of the compilation of register information into a separate database. The Office would also support prohibitions on use of this information for marketing and other commercial purposes which may not relate to public safety.

National Boards (Division 2, Disclosure of Information and confidentiality and Division 5, Records)

45. The Office supports the provision for a decision by a National Board not to publish a particular decision, subject to the public interest (Clause 266 (2)). This is in keeping with good privacy practice.
46. The Office submits that consideration might be given to including clarification in the exposure draft Bill that the information in records kept by National Boards is not for publication on the registers (Clause 276).