

1997
LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Health Records (Privacy and Access) Bill 1997

EXPLANATORY MEMORANDUM

Circulated by the authority of
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Outline

The purpose of this Bill is to provide a set of privacy and access rights for health care consumers to their own personal health information, wherever it is held in the ACT and whether it is held in the public or the private sector.

The Bill includes a set of Privacy Principles, similar to the Commonwealth Government's privacy principles, with specific modifications for the health care sector. It includes specific provisions to address the need for access to health records of children, people who are legally incompetent and subject either to an enduring power of attorney or to a guardianship order and deceased people. It provides exclusions from access only in very limited circumstances.

The intention of the legislation is to increase consumers' access to their own health information without unnecessary bureaucratic processes being put in place. If it is the normal practice of a health service provider to give consumers access to their own records without a fee, then this can continue without resort to the legislation.

Financial Impact Statement

Consumers seeking access will pay the costs of copies and of the consultation where a separate consultation is required to explain the record. Health service providers who currently provide consumers with access to their own personal health information without a fee can continue to do this.

DETAIL OF THE BILL

PART I - PRELIMINARY

Clause 1 : is the short title of the legislation - the Health Records (Privacy and Access) Act 1997.

Clause 2 : provides for the legislation to commence on 1 February 1998.

Clause 3 : sets out the objects of the Bill. These are:

- (a) to provide for privacy rights in relation to personal health information;
- (b) to provide for the integrity of records containing personal health information;
- (c) to provide for access to personal health information contained in health records;
- (d) to provide for a consumer to receive an explanation of his or her personal health information; and
- (e) to encourage agreement, concerning the exercise of a right or performance of an obligation under this Act, between the persons concerned

Clause 4 : sets out the meaning of various terms used in the legislation. Some of the most significant ones are outlined below.

A "consumer" is defined as an individual who uses or has used a health service or about whom a health record has been created, including someone authorised by a consumer in writing to have access to a health record, a guardian of a young person or of someone who is legally incompetent, or the legal representative of someone who has died. Within the safeguards set out in the Act to protect privacy, guardians and legal representatives have the same access rights as a living, adult individual would have to their own health record, in relation to the health record of the person for whom they are responsible or the dead person, as the case may be.

The definition of "factual matters" covers most of the "non-opinion" health record contents, that may be required by a consumer - the legislation requires a health service provider to give this information to a consumer, when requested, even where it relates to health services received prior to the date of commencement of the legislation.

A "health record" is defined as any record, or part of a record, which is held by a health service provider and contains personal information about a consumer or any record, whoever it is held by, that contains personal health information relating to a consumer.

The term "health service" is defined broadly to cover any activity which is intended or is claimed by the person performing it to assess, record, improve or maintain the physical, mental or emotional well-being of a consumer or to diagnose or treat an illness or disability of a consumer; or a disability, palliative or aged care service that involves the making or keeping of personal health information, unless exempted under the regulations.

A consumer's "personal health information" is defined as any personal information relating to the consumer's health, illness or disability or collected by a health provider in relation to the consumer's health, illness or disability, whether or not the information is recorded in a health record. It is a subcategory of "personal information", which is defined as any information about the consumer where he or she can be identified, whether the information is fact or opinion, true or false, and however it is recorded.

The term "record" is also given a wide definition. It includes all or part of a record in a documentary or electronic form which includes a consumer's personal health information, such as photographs, test results, X-rays and clinical notes relating to the consumer. It does not include deidentified research material.

PART II - PRIVACY PROVISIONS

Clause 5 : This clause includes a set of 12 privacy principles, which have the force of law.

Principle 1 : Manner and purpose of collection of personal health information : says health information for inclusion on a health record can only be collected for lawful purposes associated with the function or activity of the collector and by lawful means. Where it is collected by someone as part of their employment for the management, funding or quality of health services, then that person only has access for those purposes. This latter clause is designed to allow the free flow of information, where, for example, it is needed to for a health insurer to pay the costs of a consumer, or it is needed to assess the quality of care in a hospital, or it is needed to determine how best to manage a practice. However, the person with such access can use it for no other purposes without breaching the privacy principles.

Principle 2 : Purpose of collection of personal health information to be made known : This requires someone collecting a consumer's personal health information for a health record or generally available publication to inform the consumer about the purpose and reasons for which the information is being collected and the identity of any people likely to have access to the information. The only exception to this is that the collector does not have to notify someone of the identities of those employees of the collector who will have access to the information and are required to handle the information for the purposes of management, funding or quality of health services.

Principle 3 : Solicitation of personal health information generally : This requires the collector of personal health information to ensure that the information collected is relevant, up to date and complete and is not unreasonably intrusive.

Principle 4 : Storage and security of personal health information : This principle requires the person with possession or control of a health record to protect the record against loss, unauthorised access, use or modification, or other misuse, including where they lawfully hand the record on to someone else.

Principle 5 : Information relating to records kept by record-keeper : This principle requires a record-keeper to take reasonable steps to notify a consumer about health records in his or her possession or control, and how to gain access their own record or health information. Where another law of the Commonwealth or Territory prohibits access, other than in accordance with those laws, then this principle doesn't override these other laws.

Principle 6 : Access to health records by persons other than the consumer : This principle allows members of the consumer's treating team to have access to the consumer's health information so far as necessary for the provision of a health service to the consumer. It also allows access to a consumer's personal health information, without consent, for the purpose of management, funding or quality of a health service. This allows, for example, the employee in the billing part of a hospital or a health practice to have sufficient access to the consumer's health record to make up the bill, without the consumer's direct consent to this. The principle also prohibits someone directly or indirectly requiring a consumer to obtain or grant access to their health record, except where required by another law or a court. This is stop agencies who may want access to someone's personal health information from obtaining this information by requiring the consumer to grant the agency access to the person's health record.

Principle 7 : Alteration of health records : This principle prevents the deletion of information from health records even where it is later claimed or found to be incorrect, unless this occurs as part of an archival destruction. This was considered important, because of the need to ensure that it was clear why someone had been treated in a particular manner, even though the information upon which the treatment occurred may have been inaccurate. Where leaving incorrect information on the current record may cause harm to the consumer or result in incorrect health care, or it is otherwise inappropriate to leave the incorrect information on the current record, the incorrect information can be placed on a different record which is not generally available to the treating team . This principle also requires the record-keeper to take reasonable steps to ensure a record is accurate, relevant, up-to-date, complete and not misleading. This includes making any additions or corrections that from time to time become necessary. If there is a conflict between a consumer and a provider about the accuracy of information, and no other law compels correction, then the record-keeper must take reasonable steps to include the consumer's written statement on the record as well.

Principle 8 : Record-keeper to check accuracy etc. of personal health information before use etc : Before using personal information, a record-keeper must take steps which are reasonable in the circumstances to ensure the information is accurate up-to-date and complete. Where information is provided in confidence to a health service provider, the health service provider should encourage the person to waive the requirement of confidentiality. The concern here is that information provided in confidence may or may not be accurate, and so far as possible, such information should be able to be checked with the consumer before treatment based upon such information is carried out. Where a person will not waive the confidentiality, then the health service provider must only record the information if it is likely to assist in the treatment or care of the consumer. In any case, the requirement to reasonably ensure that the information is accurate and not misleading remains.

Principle 9 : Limits on use of personal health information : This principle limits the use of personal health information (except where it is being used appropriately by treating team members) to circumstances where:

- the consumer has consented to its use;
- the use of the information is necessary to prevent or lessen a significant risk to the life or physical, mental or emotional health of the consumer or someone else;
- the use is required or authorised by law;
- the use is directly related to the purpose for which the information was obtained; or
- the use is related to the management, funding or quality of health services received by the consumer

Principle 10 : Limits on disclosure of personal health information : This principle sets out similar limitations to principle 9, but in relation to disclosure of the information. It limits the powers of anyone who gains access to the information under the first part of the principle from disclosing the information other than for the purpose for which the information was originally disclosed. In the case of a treating team, the person in charge of the team should notify the consumer of the identity of any individual members of the team, where this is not obvious from the circumstances or context of the health service. This may occur, for example, where another practitioner is consulted in relation to the care of the consumer, though the consumer doesn't see that clinician. Where the person who has access to the person's personal health information or record as part of the management, funding or quality of the health service, then the treating team leader doesn't have to notify the consumer of the identity of individuals or classes of individuals involved in these activities. The principle also provides an exception for the disclosure of information to immediate family members in an emergency to the extent necessary and reasonable for the proper treatment of the consumer.

Principle 11 : Transfer or closure of the practice of a health service provider : This principle applies to consumer health records where a practice is sold, transferred or closed down. The principle requires notice be given of the sale, transfer or cessation of practice of a health service provider, in a local newspaper and through other steps. Records are to be transferred either to the new practice owner, to safe storage by a competent record-keeper in the Territory, to a provider nominated by a consumer or to the consumer to whom the record relates.

Principle 12 : Transfer of consumer to another health service provider or of health service provider to another practice : This principle requires a record-keeper to transfer a consumer's record, a copy or a written summary of the record to either the consumer's new health service provider or to the consumer's continuing health service provider who has moved practices on payment of a fee, or if no fee has been set by the Minister, at no cost.

Clause 6 : requires compliance with the Privacy Principles set out above, unless compliance would contravene another law of the Territory, the Commonwealth or a court order.

Clause 7 : relates to health status reports, which are reports prepared for reasons other than the provision of a health service to a consumer eg an employment report, a compensation or insurance report. It requires that a consumer give written consent to the provision of such a report from a named health service provider and that the consumer may obtain a copy of any such report. A consumer may comment on the copy of the report and the agency that requested the health status report is to give due consideration to the comments and to retain the comments for as long as the report is retained. The provision does not apply where the health status report is provided under a law of the Territory, the Commonwealth or an order of a court.

PART III - RIGHT OF ACCESS TO PERSONAL HEALTH INFORMATION

Clause 8 : allows a health service provider to provide a consumer with access to her or his own health record outside the provisions of this part, subject to any requirement to claim an exemption.

Clause 9 : allows consumers and health service providers to make alternative arrangements to carry out the actions required by the Act, by agreement between the parties eg vary time limits, agree a different way to provide access etc.

Clause 10 : Subclause 10(1) provides a right of access for a consumer to a record prepared by a health service provider that contains items of personal information, including personal health information, and a right of access to personal health information in records kept by people or organisations other than health service providers. This right exists for all factual matters, whenever they were entered on the record and for expressions of opinion that are entered onto the record on or after the date of commencement of the Act.

Subclause 10(2) limits the right of access where that access would contravene Territory or Commonwealth law or a court order.

Subclause 10(3) outlines the means of exercising access - through the opportunity to inspect the record and take notes of its contents, to be given a copy, or to have an opportunity to view the record and have it explained by an appropriate person.

Subclause 10(4) allows for imposition of a fee or charge in accordance with this Act in the case of a copy or an explanation. No charge is payable where the consumer simply views the record and takes notes.

Subclause 10(5) requires the record-keeper to provide the requested access.

Subclause 10(6) allows a person under 18 to be given access to their own health record, unless they are a "young person" for the purposes of the Act, when their guardian can exercise that right.

Subclause 10(7) allows the guardian of a legally incompetent person to exercise the consumer's rights under this section.

Clause 11 : Subclause 11(1) implies a term in all contracts for the provision of health services that a consumer will be allowed to have access to their own health record by the provider, in accordance with this Act.

Subclause 11(2) specifies that this term is implied in all such contracts created after the date of commencement of this Act either where the contract is made in the Territory, the contract was performed partly or wholly within the Territory or the consumer resided in the Territory when the contract was made, and whether or not the consumer was a party to the contract. This latter point is intended to address the possible difficulties otherwise faced by a consumer where, for example, they were a child at the time of the service and a relative paid for the health care service.

Subclause 11(3) requires a record-keeper to give access to any health record held within the Territory.

Subclause 11(4) requires a health service provider to give access to a health record relating to any health service provided to a consumer.

Subclause 11(5) states that subclause 11(1) and subclauses 11(3) and 11(4) operate independently.

Subclause 11(6) states that, for the purposes of this section, it is irrelevant whether the health service was provided in the Territory or the health record is located in the Territory (except under subclause 11(3)).

Subclause 11(7) makes any attempt to contract out of the provisions of this section void.

Subclause 11(8) makes it clear that nothing in this section affects the operation of section 10. For example the existence of the implied contract provisions for health services, provided on or after the date of commencement of the Act, does not affect the consumer's retrospective access to factual matters set out in 10.

Clause 12 : states that a consumer may request access and then specifies how this can be done. Requests may be oral, except in the case of a request by a legal representative or a guardian in certain circumstances. A record-keeper may require a request to be in writing.

Clause 13 : outlines what a record-keeper must do when a request for access is received (unless the parties have agreed to other arrangements, as allowed by clause 9).

Subclause 13(2) : requires, within 14 days of a request,

- that access be given to a consumer,
- that a consumer is notified in writing that access will be given and whether payment of an applicable fee or charge is required prior to this, or
- that the consumer is notified in writing that the request is subject to either non-production or exemption from the requirements to produce a record or part of a record, as set out in the Act, and
- that the consumer is notified of the ground for non-production or exemption.

Subclause 13(3) : requires a record-keeper to give notice of the part or parts of the record which are subject to exemption, and provide access to the rest of the record.

Subclause 13(4) : imposes a 30 day time limit on provision of access, or 7 days after payment of the applicable fee or charge, unless non-production or an exemption has been claimed.

Subclause 13(5) : sets out the ways a health service provider can comply with a request for access. Among other things, it allows a provider to make available an accurate summary of the record rather than a whole copy, but only with the agreement of the consumer. It also requires that if a record was made prior to the commencement of the Act and the consumer wants a copy, that if the copy is not provided voluntarily by the health service provider, the provider must provide a written summary of the factual matters contained in the record.

Subclause 13(6) : allows a health service provider to charge their normal consultation fee for provision of an explanation.

Subclause 13(7) : allows a consumer to give written authority for someone else to access their record on their behalf.

Subclause 13(8) : allows a provider to require proof of identity of the consumer, and proof of identity and authorisation of a person other than the consumer, who seeks authorised access to a record.

Subclause 13(9) : sets out various actions which are defined as a refusal to give access to the record.

Clause 14 : provides for non-production of a record when the record is not in the possession, custody or control of the record-keeper, where the record doesn't relate to the consumer, or the production would contravene a law of the Commonwealth or Territory or a court order.

Clause 15 : exempts part or whole of record from production where there are reasonable grounds to believe that the provision could be a significant risk to the life, physical, mental or emotional health of a consumer or someone else.

Clause 16 : sets out the processes required if an exemption is claimed for potential harm to the health care consumer who has sought access to her or his own record.

Subclause 16(2) permits a record-keeper to offer to discuss the health record with the consumer, where an exemption may be claimed for potential harm to the consumer.

Subclause 16(3) allows a consumer to nominate in writing a health service provider who will be given access to his or her record, where the record-keeper believes it would do harm to give the record directly to the consumer.

Subclause 16(4) puts in place a process for when a health service provider objects to the nominee of the consumer.

Subclause 16(5) does not allow a health service provider to object to a consumer's nominee when the nominee is registered with the same board as the health service provider, or the nominee is a doctor who has the ability to understand and interpret the health record, or the nominee provides the same kind of service as the health service provider who wrote the health record and has the ability to understand and interpret the health record.

Subclause 16(6) sets circumstances where the consumer's nomination lapses, while subclause 16(7) allows a consumer to make another nomination in these circumstances.

Subclause 16(8) requires the record-keeper to provide the record or a legible copy of it to the nominated provider within 14 days of the nominee notice, unless an objection notice is lodged.

Subclause 16(9) : sets out the functions of the nominated health service provider - to consider whether the claim for exemption is valid, to explain the grounds for the exemption to the consumer, to discuss the content of the record with the consumer, and if satisfied that there is no longer any significant risk to the consumer, to make the record available to the consumer. If the consumer's nominee is not satisfied that the risk to the consumer has abated, then the nominee can continue to refuse to give the consumer access to the exempted part of the record.

Clause 17 : states that material which is given in confidence is exempt from being produced on the consumer's request.

Subclause 17(2) does not extend this exemption to material provided by the consumer, their guardian or a health service provider who is treating the consumer.

Subclause 17(3) provides that any material which the consumer identifies as being provided in confidence and is so marked by the health service provider, can be exempt from access, where access is later requested by a guardian or legal representative.

PART IV - COMPLAINTS AND REQUESTS TO REVIEW

Clause 18 : allows a complaint to be lodged with the Community and Health Services Complaints Commissioner about a breach of the privacy principles set out in this Act or about a refusal to give access. It also allows for a requests to review to be lodged with the Commissioner in relation to a record which has been exempted.

Clause 19 : states that the Commissioner can investigate complaints and make decisions on requests to review. As noted, decisions on requests to review are themselves reviewable in the Magistrates Court.

PART V- OFFENCES

Clause 20 : makes it an offence to threaten or intimidate someone to get their consent under the Act, or to do any act which requires consent, without that consent. It also makes it an offence to make false representations that someone is legally required to consent to the provision of a health status report.

Clause 21 : makes it an offence to destroy, deface or damage a health record or to take it from the Territory for the purpose of evading or frustrating the operation of the Act.

Clause 22 : makes it an offence to request or obtain access to a health record by any unlawful threat, intimidation or false representation..

Clause 23 : makes it an offence, without reasonable grounds, to try to get a consumer to refrain from requesting access to a record, for requesting a review of a claim for exemption or to withdraw either of these requests.

Clause 24 : relates to the prosecution of offences by corporations.

Note : Other breaches of privacy are dealt with by way of a complaints process rather than offences.

PART VI - MISCELLANEOUS

Clause 25 : states that where a young person is a consumer, the powers and rights conferred by this Act are exercisable by the young person's guardian.

Clause 26 : states that where a consumer is a legally incompetent person, the powers and rights conferred by this Act are exercisable by that person's guardian (under either a guardianship order or an enduring power of attorney, which has become effective).

Clause 27 : relates to deceased consumers. It preserves the privacy principles in the case of a deceased person, and gives the consumer's rights or powers under the Act to a legal representative of the consumer. The legal representative cannot consent if it was known to him or her that the deceased's expressed wish while alive was not to give such consent.

Clause 28 : makes it clear that legal professional privilege is not affected by this Act.

Clause 29 : protects a person who acts in good faith in respect to a void or defective notice or request purportedly made under this Act.

Clause 30 : requires an unqualified record-keeper who lacks the skill or training necessary to perform a function under the Act to obtain and act on appropriate advice.

Clause 31 : sets out the jurisdiction of the Magistrates Court in relation to matters that arise under the Act, such as declarations that someone is a guardian or a young person or restraining orders to prevent destruction of records or other offences under the Act.

Clause 32 : provides for appeals from the Magistrates Court to the Supreme Court.

Clause 33 : deals with potential inconsistencies between court orders and the provisions of the Act.

Clause 34 : allows the Minister to determine fees under the Act.

Clause 35 : is a regulation-making power.

Clause 36 : refers to the consequential amendments to other Acts set out in the Schedule and detailed below.

Clause 37 : says that this Act does not limit other laws that relate to access, privacy or confidentiality, except to the extent that it does so expressly.

THE SCHEDULE - AMENDMENTS OF OTHER ACTS

Freedom of Information Act 1989:

Section 6(1) is amended to exempt an agency, in respect of documents that are health records within the meaning of the new legislation., and documents held by the Community and Health Service Complaints Commissioner in relation to any review or complaints under the new legislation.

Community and Health Services Complaints Act 1993

There are a number of amendments to enable the Community and Health Services Complaints Commissioner to investigate and decide complaints and review other decisions under the new legislation. This includes the insertion of a new Part IVA into the Community and Health Services Complaints Act, which covers the review process and provides that the Magistrates Court may review any decision made in relation to a request for review, by way of a *de novo* hearing. It also provides for an appeal to the Supreme Court.