

Health Records Act 2001

Act No. 2/2001

EXPLANATORY MEMORANDUM

General

This Act creates a scheme to regulate the collection and handling of health information in Victoria. It—

- establishes standards for the handling of health information which are to apply to personal health information collected, used and held in the public and private sectors; and
- gives individuals an enforceable right of access to their health records that are held by private sector organisations.

The Health Privacy Principles set out in Schedule 1 relate to the collection, use, disclosure, quality, security, retention and transfer of, and access to, health information.

Section Notes

PART 1—PRELIMINARY

Section 1 sets out the main purposes of the Act.

Section 2 provides for the Act to come into operation by proclamation, and for the automatic commencement on 1 July 2002 of any provisions that have not commenced operation before that date.

Section 3 defines terms used in the Act.

The Act applies to health information, which is a subset of "personal information". ("Personal information" is information or opinion about an individual whose identity is apparent or can reasonably be ascertained from that information or opinion. See below for a further discussion of this term.)

"Health information" includes personal information that is—

- information or opinion about—
 - an individual's physical, mental or psychological health;
 - a disability of an individual;
 - an individual's expressed wishes about the future provision of health services to him or her;
 - a health service provided to the individual;
- collected to provide a "health service";
- collected in connection with the donation of body parts;
- genetic information in a form that is, or could be, predictive of the health of an individual or any descendants.

The "Health Privacy Principles" (HPPs) are the 11 principles in Schedule 1 of the Act. Each principle is referred to by its number in this Act. For instance, Health Privacy Principle 1 is described in the Act as "HPP 1".

These principles are broadly consistent with the Information Privacy Principles in the **Information Privacy Act 2000**. Necessary changes have been made to tailor them to health information and the provision of health services.

A "health service" includes activities that are intended or claimed by the individual receiving the service, or the organisation performing it, to assess, maintain or improve the individual's health, or to diagnose or treat an individual's illness, injury or disability. Disability services, palliative care services, aged care services and the dispensing of prescriptions for drugs or medicinal preparations by a pharmacist are also health services for the purposes of the Act. Information collected to provide, or in providing, a health service falls within the definition of "health information" and therefore must be handled under the HPPs accordingly.

"Health service provider" includes an organisation to the extent that it provides a "health service" in Victoria.

"Individual" refers to a natural person. Throughout the Act the reference to "individual" generally means the individual about whom "health information" relates. Sections 45(2), 95 and the

definition of "personal information" set out how the Act applies to deceased individuals.

The definition of "law enforcement agency" includes Victoria Police and other public bodies that carry out "law enforcement functions". It also applies to a contractor within the meaning of the **Corrections Act 1986**. The HPPs refer to specific grounds of collection, use and disclosure of information by law enforcement agencies in relation to the performance of law enforcement functions. HPP 6 also permits the refusal of access to information to avoid prejudice to a law enforcement function by or on behalf of a law enforcement agency.

The definition of "law enforcement function" clarifies which functions of a law enforcement agency attract the application of specific HPPs.

"Organisation" is the term adopted in the Act to identify all entities that are regulated under it. The components of "organisation" are set out in Division 1 and 2 of Part 2.

The definition of "personal information" includes information or opinions about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion. Whether a person's identity can reasonably be ascertained will vary, depending upon the circumstances. For example, information may not be "personal information" when it is held by one organisation, because it cannot reasonably ascertain the identity of an individual from the information. However, if the individual's identity could be reasonably ascertained by another organisation from the same information, it would be "personal information" in the hands of that organisation.

Section 4 aids in the interpretation of other terms in the Act.

Section 5 clarifies when an organisation is taken to hold health information. Health information must be contained in a document. The term "document" is defined in the **Interpretation of Legislation Act 1984**. It includes paper documents, electronic records and other records such as X rays.

Health information does not need to be situated in Victoria in order to be considered to be held by an organisation. For example, if an organisation in Victoria controls health information which is located elsewhere, then that organisation would be considered to be holding that health information for the purposes of the Act.

Section 6 sets out the objects of the Act.

Section 7 describes the relationship of the Act to other Acts.

Sub-section (1) provides that provisions in any other Victorian Act will prevail over any provision of the Health Records Act to the extent that the laws are inconsistent. For example, confidentiality provisions in other Acts that apply to information that is "health information" within the meaning of this Act, and regulate the disclosure of information would override the rules about disclosure in HPP 2, to the extent of any inconsistency.

Section 8 provides that the Act must not be taken to create any additional legal right enforceable in a court or tribunal beyond those set out in the Act.

Section 9 provides that the Act binds the Crown.

PART 2—APPLICATION OF THIS ACT

Division 1—Public Sector Organisations and Division 2—Private Sector Organisations

Sections 10 and 11 respectively list those entities that are public sector organisations and private sector organisations for the purposes of this Act. The Act applies to public sector organisations and private sector organisations, to the extent that they either provide a health service in Victoria, or are located in Victoria and collect, use or hold health information (subject to the exemptions in Division 3).

Section 12 explains the situations when an interference in privacy by an outsourced service provider acting under a State contract may be taken to be an interference in the privacy of the individual done or engaged in by the outsourcing public sector organisation. For example, where an outsourced service provider is wound up and a complaint cannot be enforced against it, the individual may bring the complaint against the outsourcing organisation if the interference in privacy occurred as a result of an act or practice under a State contract.

Division 3—Exemptions

- Section 13 exempts acts and practices engaged in by a person in connection with his or her personal, family or household affairs.
- Section 14 exempts courts and tribunals, and the holders of offices, from compliance with the Act in respect of the exercise of their judicial or quasi-judicial functions. For example, there are no restrictions on the giving, producing, hearing or use of evidence and argument by courts or tribunals.
- Section 15 grants an exemption in respect of specified types of information that are regarded as publicly available information, including public registers. With limited exceptions, the Act seeks only to regulate health information that is not publicly available. One exception is where health information has become publicly available as a result of an organisation breaching the Act. For example, if health information is posted on the internet as a result of a contravention of HPP 2, and an organisation that reads this information is aware that it was obtained in breach of the Act, then this same organisation does not have any exemption in relation to the further handling of that information.
- Section 16 This section, together with section 8, ensures that the **Freedom of Information Act 1982** ("FOI Act") will continue to regulate individuals' access to their own health information where it is held by public sector agencies such as public hospitals and Government departments. The access regime set out in HPP 6 and Part 5 of this Act does not apply to agencies subject to the FOI Act, or to other public bodies that are exempted under the FOI Act (eg by regulations or in relation to courts in the performance of their judicial functions), or to information when it is held in documents that are subject to the FOI Act.
- Section 17 provides a limited exemption for a "news medium" handling health information in connection with its news activities. The exemption does not operate in respect of all HPPs and only applies in connection with the news medium's "news activities". It does not exempt a news medium from complying with all HPPs in respect of, for example, any health information they hold about their staff.

PART 3—PRIVACY OF HEALTH INFORMATION

Section 18 sets out what constitutes "an interference with the privacy of an individual" and can therefore be the subject of a complaint, investigation or compliance notice under the Act.

An interference in privacy includes a breach of any of the Health Privacy Principles (HPPs) in relation to health information, a failure to provide access in accordance with Part 5 or HPP 6 and a breach of HPP 7 in relation to an "identifier" (as defined in section 3).

Section 19 states that the Health Privacy Principles (HPPs) are set out in Schedule 1. The core elements of the HPPs are consistent with the Information Privacy Principles in Schedule 1 of the **Information Privacy Act 2000**. However, the HPPs specifically address issues pertaining to health information and the provision of health services, and adjusted to have appropriate application to both the public and private sectors.

Nothing in the HPPs is intended to override any exemption in Division 3 of Part 2.

Section 20 specifies how the HPPs apply to information. Generally the principles apply to information collected both before and after the commencement of this provision. The main exceptions are that—

- HPP 1 (the collection principle) only applies to information that is collected after commencement. The manner in which information was collected prior to the commencement is not regulated by the Act. However, the remaining HPPs may in the circumstances have application to the health information collected prior to commencement. For example, health information collected before commencement and still held by an organisation will be required to be securely stored in accordance with HPP 4;
- HPP 6 (the access principle) applies as specified in section 25.

Section 21 provides that, subject to the transitional arrangements provided in this section, an organisation must not do an act, or engage in a practice, that is an interference with the privacy of an individual. That is, they must not breach a HPP or Part 5 of the Act. This duty does not apply where compliance would involve contravention of another Act or regulations, or of an order of a court or tribunal.

This provision also provides for a transition process for a limited period in relation to HPP 1 and 2, to take account of the fact that compliance from the first day of commencement may not always be feasible, for instance where a contractual duty requires the performance of an act or practice that would breach one of these principles, where the contract was entered into before the second reading of the Bill for this Act in the Legislative Assembly. (In such a case the duty to comply does not arise for two years after commencement.)

Most of these transitional arrangements relate to HPP 2. HPP 2 governs the use and disclosure of information. Section 20 provides that HPP 2 applies to information collected before, as well as after, commencement. This provides a greater level of privacy protection than would be afforded if it were confined to information collected after commencement. However, it is necessary to allow limited non-compliance with HPP 2 in relation to information collected before commencement, to take into account activities that, for instance, may have commenced before commencement but which will continue afterwards. This provision sets out three ways in which a "period of grace" is permitted—

- where a contractual duty applies and the contract was entered into as outlined above;
- where the Health Services Commissioner grants a limited exemption, where satisfied it is in the public interest to do so; and
- in accordance with the regulations.

PART 4—GUIDELINES

Section 22 provides that the Health Services Commissioner may, by notice published in the Government Gazette, issue or approve guidelines for the purposes of those paragraphs in the HPPs that specifically require or permit guidelines to be made. A failure to comply with the guidelines referred to in the HPPs is an interference with privacy, as the guidelines form part of the relevant principles.

The provision sets out a public consultation process that must be undertaken by the Commissioner before guidelines are issued or approved.

Section 23 provides that the Health Services Commissioner may revoke guidelines, by notice published in the Government Gazette.

Section 24 provides that the Governor in Council may disallow a decision of the Health Services Commissioner to issue, approve, revoke or vary guidelines.

PART 5—ACCESS TO HEALTH INFORMATION

Division 1—Right of Access

Section 25 provides that an individual has a right of access under Part 5 and HPP 6 to health information about him or her that is held by an organisation as follows—

- the right of access applies to all health information that is collected after the commencement of this section; and
- the right of access applies to certain kinds of health information that are collected before the commencement of this section. For example, the right of access applies to existing health information that relates to the individual's health history, examination findings, diagnoses, plans of management, proposed plans of management and action taken, genetic information that is predictive of health, and information connected with donation of body parts.

Section 26 provides that access must not be given if the organisation believes on reasonable grounds that granting access would pose a serious threat to the life or health of the individual or any other

individual. Where the serious threat relates to the health of a person, this would include any aspect of their health, such as a serious threat to physical, psychological or mental health.

Section 27 provides that access must not be given to health information that was originally given in confidence on the understanding that it would not be provided to the individual about whom it relates. Organisations are required to follow HPP 1.7 when collecting such information.

There are some restrictions on the operation of this section. For example, it does not apply where one health service provider provides information or opinion to another health service provider in the relation to an individual's treatment.

Section 28 specifies the ways in which a right of access may be exercised under this Act.

Where the information is collected after commencement, the right may be exercised by—

- inspection of the information;
- obtaining a copy (or, with the agreement of the organisation concerned, an accurate summary); and
- viewing the information and receiving an explanation if the organisation is a health service provider (or in any other case, with the agreement of the organisation).

Where the information is collected before commencement the individual is entitled to receive an accurate summary of that information. The other forms of access outlined above are only available with the agreement of the individual and the organisation.

Section 29 specifies how an organisation must respond to a request for access made under this Act.

Section 30 enables individuals to authorise, in writing, another person to be given access to their health information.

Section 31 requires an organisation to take reasonable steps to satisfy itself that the individual making a request for their own health information is in fact the person they purport to be, or that where a person purports to be authorised under section 30 or 85 that they indeed have the authority they claim. An organisation

would not be in breach of Part 5 if it refuses to provide access because it is not satisfied that the individual's identity or the representative's authority has been established.

Section 32 provides that a fee may only be charged for a particular manner of access under the Act where the regulations have fixed a maximum fee for that kind of access. However, in the case where a fee is charged for providing an explanation of a person's health information, this section permits a fee that does not exceed the usual consultation fee of the person who provides the explanation.

Division 2—Request for Access

Section 33 outlines the steps that an individual must take to seek access to their health information. Whilst an organisation may accept an oral request, it may choose to require a written request.

Section 34 outlines the steps that an organisation is required to take to respond when it has received a request for access.

Section 35 specifies when an organisation is taken to have refused access to health information.

Division 3—Refusal of Access on Ground of Threat to Life or Health of the Individual Requesting Access

Section 36 explains that this Division applies where access is refused according to section 26 on the ground that granting access as requested would pose a serious threat to life or health of the individual seeking access. It does not apply where the serious threat relates to another person.

Section 37 provides that in the circumstances where this Division applies, an organisation may offer to discuss the health information with the individual, or, if it is not a suitably qualified health service provider, arrange for a specified health service provider to discuss it. It may be that the individual's desire to know and understand their health information will be satisfied through this process and the risks to their life or health can be avoided. If an offer to discuss is made, it is to be included in the notice of refusal that is required to be sent under section 34(2).

If the organisation does not offer an opportunity to discuss the health information, it is required to notify the individual in the notice of refusal that he or she may nominate a health service provider for this purpose.

Sections 38 to 41 set out a procedure that applies where the organisation and individual do not necessarily agree about who should act as a nominated health service provider or if a nomination lapses.

Section 42 describes the functions of the nominated health service provider who has agreed to discuss the individual's health information for the purposes of this Division. The primary functions include—

- explaining to the individual that it will discuss the reasons for the refusal of access with the organisation;
- forming an opinion about the validity of the grounds for refusal (that is whether there are reasonable grounds to believe that access poses a serious threat to the individual's life or health);
- explaining the grounds for refusal and discuss the health information with the individual (but only if these are appropriate in the circumstances);
- allowing inspection by the individual if satisfied that the serious threat does not exist, and in such a case a copy may be provided to the individual if the organisation agrees. (If the nominated health service provider is not so satisfied, he or she is to decline to allow the individual to inspect or have a copy of the health information).

Division 4—Miscellaneous

Section 43 clarifies that organisations may provide access in a different form or in a different manner than is provided for in this Act with the consent of the individual.

Section 44 provides that it is a term of a contract to provide a health service that the health service provider will allow the individual access to health information in accordance with this Act.

This condition applies whether or not an individual is a party to the contract.

PART 6—COMPLAINTS

Division 1—Making a Complaint

- Section 45 provides that an individual may complain to the Health Services Commissioner ("the Commissioner") about an act or practice that may be an interference with privacy.
- Section 46 allows the Health Services Commissioner to deal with complaints referred by the Ombudsman or the Victorian Privacy Commissioner.
- Section 47 specifies how a complaint may be made to the Commissioner where an individual is unable to complain by reason of youth, injury, disease, senility, illness, disability, physical impairment or mental disorder.

Division 2—Procedure after a Complaint is Made

- Section 48 requires the Commissioner to notify the respondent in writing of a complaint as soon as possible after receiving it.
- Section 49 allows the Commissioner to make a preliminary assessment of a complaint to determine whether, and to what extent, to accept the complaint, including by inviting any person to attend or to produce any document. During the period of preliminary assessment, the Commissioner may also try to informally resolve the complaint. For example, if a complaint relates to a failure to give access to health information, the Commissioner might contact the organisation to inform it that a complaint had been made and assist the organisation to interpret its obligations under the Act.
- Section 50 allows the Commissioner to split complaints into distinct complaints that can be dealt with separately.
- Section 51 gives the Commissioner discretion to refuse to deal with a complaint in certain circumstances. If the Commissioner decides not to entertain the complaint, the individual who made the complaint may require the Commissioner, within a specified period, to refer it to the Victorian Civil and Administrative Tribunal (the Tribunal). Otherwise the complaint will be dismissed. The Commissioner may decline to accept frivolous or vexatious complaints at this stage.
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The Commissioner may refer complaints to the Victorian Privacy Commissioner or the Ombudsman where appropriate, or suggest that a request for access ought to be made under the FOI Act.

- Section 52 empowers the Commissioner to refer a complaint to the relevant health practitioner registration board if that board is willing to accept it and has power deal with the matter, and the Commissioner considers that it is appropriate to refer the complaint. This could apply to an act or practice that may be a breach of professional conduct.
- Section 53 allows the Commissioner to dismiss a complaint where information sought from a complainant has not been supplied within 90 days.
- Section 54 allows the Minister to refer a complaint to the Tribunal for hearing where it raises an issue of important public policy.
- Section 55 provides that if a complaint about a registered health service provider is accepted by the Commissioner or referred to another authority such as the Privacy Commissioner or the Ombudsman, the appropriate registration board must be given a copy for its information.
- Section 56 sets out what process may be adopted upon a complaint being accepted. Depending upon the circumstances, the Commissioner may decide to conciliate the matter, conduct an investigation for the purpose of making a ruling under Division 4 or, if both of these options are inappropriate, the Commissioner may decline to entertain the complaint further.
- Section 57 provides that where the Commissioner decides that it would be inappropriate to conciliate or make a ruling, the complainant may ask the Commissioner in writing to refer the complaint to the Tribunal for hearing.
- Section 58 requires the Commissioner to cease dealing with a complaint or part of a complaint in certain situations, such as where he or she becomes aware that one of the parties has begun legal proceedings in a court or tribunal that relate to an issue raised in the complaint.

Division 3—Conciliation of Complaints

- Section 59 provides for the Commissioner to make all reasonable endeavours to conciliate a complaint that has been accepted for conciliation.
- Section 60 gives the Commissioner the power to require any person to provide information or produce documents where the Commissioner considers that they would be relevant to conciliation. This power does not apply where the Secretary to the Department of the Premier and Cabinet certifies that the information the subject of a request for production, if included in a document, would be classified as exempt as a Cabinet document under section 28(1) of the FOI Act.
- Section 61 provides for the registration of a conciliation agreement with the Tribunal. Agreements that are registered are enforceable as orders of the Tribunal.
- Section 62 makes evidence of statements made and things done in the course of conciliation, or documents prepared by a party for, or in connection with, conciliation, inadmissible in certain proceedings. This is to encourage open discussion in conciliation, without the parties fearing that what they say or do may be used against them in such proceedings if the conciliation is unsuccessful.
- Section 63 describes the procedure to be followed in the event that the complaint is not successfully conciliated. The Commissioner has the option of investigating the matter under Division 4 for the purpose of making a ruling (subject to the wishes of the complainant) or may take no further action. The complainant may require that the matter be referred to the Tribunal for hearing under Division 6.

Division 4—Investigation, Rulings and Compliance Notices

- Section 64 describes the procedure for the Commissioner to investigate a complaint and make a ruling about whether there has been an interference with the complainant's privacy. If the Commissioner is satisfied that there has been an interference with privacy, the Commissioner may specify action that is to be taken to remedy the complaint. Whilst the respondent is not

obliged to comply with a ruling that specifies action, it must advise the Commissioner about what action, if any, it has taken.

Section 65 provides that following the making of a ruling the complainant may require the Commissioner to refer the complaint to the Tribunal for a hearing under Division 6. This option is open when the complainant receives the ruling or if the respondent fails to comply with the ruling or to report to the Commissioner about the action it has taken. The respondent may require the matter to be referred to the Tribunal upon receipt of the ruling.

Section 66 specifies the procedure by which the Commissioner may investigate a matter and serve a compliance notice on an organisation.

Where the Commissioner is satisfied that an organisation has committed a serious or flagrant contravention of the Act, or has breached the Act on at least 5 separate occasions within the previous 2 years, the Commissioner is able to require the organisation to take action within a specified period.

For example the Commissioner may order that an organisation discontinue the activity that constitutes the breach, and report back to the Commissioner for a specified period to confirm compliance. Failure to comply with a compliance notice is an indictable offence under section 71.

Sub-section (6) allows the Health Services Commissioner to take into account the extent to which the organisation has complied with a decision of the Tribunal in deciding whether or not to serve a compliance notice.

Section 67 gives the Commissioner the power to obtain information or require the production of documents or the giving of evidence where relevant to an investigation.

Section 68 requires the Commissioner to investigate a matter expeditiously and provides that the Commissioner is not bound by the rules of evidence.

Section 69 gives the Commissioner the power to examine witnesses where they have been required to attend under section 67.

Section 70 provides for the continued operation of the privilege against self-incrimination.

Section 71 provides that it is an indictable offence for an organisation to fail to comply with a compliance notice. The maximum penalty in the case of a corporation is 3000 penalty units (currently \$300 000) and 600 penalty units in any other case (which is currently \$60 000).

Section 72 provides that an individual or an organisation whose interests are affected by a compliance notice issued by the Commissioner may apply to the Tribunal for review of the decision to serve a compliance notice.

Division 5—Interim Orders

Section 73 permits the Tribunal to make an interim order to prevent any action that could prejudice resolution of a complaint or any order that it might subsequently make.

Division 6—Jurisdiction of the Tribunal

Section 74 sets out the jurisdiction of the Tribunal to hear complaints referred to it by the Commissioner or the Minister under this Part.

Section 75 identifies the parties to a complaint before the Tribunal.

Section 76 specifies a limit of 30 days (with possible extension for another 30 days) for the commencement of the hearing of a complaint referred by the Minister under section 54.

Section 77 specifies how the Tribunal is to deal with documents produced that are classified as exempt documents within the meaning of section 28(1) of the **Freedom of Information Act 1982** as cabinet documents.

Section 78 describes what the Tribunal may decide after hearing a complaint. In the event that the Tribunal finds that the complaint about interference with privacy proven, it may make a variety of orders. For example it may order that the respondent—

- provide access to health information of the individual;
- cease a certain act or practice;
- perform an act or course of conduct to redress loss or damage,

- pay compensation up to a maximum of \$100 000;
- correct the details of health information contained in a record held to make sure they are accurate.

PART 7—OFFENCES

Section 79 defines the term "false representation" for the purposes of this Part.

This Part sets out several offences that relate to seriously inappropriate conduct in the handling of health information. These include the offences of—

- destroying, defacing or damaging health information held by an organisation with the intent to evade or frustrate the operation of the Act. It is also an offence to send health information out of Victoria for the same purpose (section 81);
- to request or obtain access to health information by way of threat, intimidation, or false representation. For example, it is an offence to falsely claim someone else's identity for the purpose of obtaining access to their health information (section 82); and
- failing to attend before the Commissioner as required under this Act or obstructing the Commissioner in the performance of functions or duties under this Act (section 84).

PART 8—GENERAL

Section 85 enables various kinds of representatives who are authorised under other laws to make decisions on behalf of another individual to be able to access, receive, correct or otherwise handle the relevant individual's health information as necessary for those decisions. This section is not intended to create any new powers for medical decision-making.

An "authorised representative" may exercise a right of access, or consent to the receipt of information or to the disclosure of information to another, when the individual concerned is incapable of making the relevant decision as outlined in sub-section (3). This includes where the individual is not capable of understanding the nature of giving consent or making a request for access despite the provision of reasonable assistance.

Sub-section (4) permits the denial of access to an authorised representative of an individual (such as a parent or guardian) where providing that representative with access may prejudice the health or safety of the individual concerned. Throughout the Act and in this section, "health" includes any aspect of a person's health, such as physical, psychological or mental health.

Sub-section (6) describes who is an authorised representative. Relevant persons include those who are empowered under statute or common law to perform functions or duties or to exercise powers on behalf of the individual, such as guardians or a person who holds a power of attorney.

An authorised representative may only give consent, or request access, on behalf of the individual if it is reasonably necessary for the performance of the functions, powers or duties of that representative, as set out in sub-section (6). For example, an agent under the **Medical Treatment Act 1988** might request access on behalf of an individual for particular information that is required to enable that agent to make a medical treatment decision for that individual.

Section 86 protects persons from personal liability in connection with specified actions under this Act.

Sections 87 and 88 specify the functions and powers of the Health Services Commissioner.

Section 89 provides that the Commissioner must have regard to the objects of this Act in the performance of functions and the exercise of powers under this Act.

Section 90 provides for the confidentiality of information gained by the Commissioner and employees of the Commissioner that is acquired in the performance of functions or duties and the exercise of powers under this Act.

Section 91 enables the Commissioner to delegate powers under this Act.

Section 92 provides that an organisation, and not its employee, is generally responsible for the actions of the employee provided that the employee was operating within the normal scope of his or her employment. This does not apply where the organisation can

show that it took reasonable precautions and exercised due diligence to prevent the relevant action from occurring.

Section 93 provides that each member of a committee of management of the organisation is to be taken to be guilty of an offence where the organisation has breached the Act and is unincorporated. This is because it is not possible to charge an unincorporated body.

Section 94 specifies which persons are competent to prosecute offences under the Act. This authority is limited to members of the police force, and the Health Services Commissioner or a person authorised by the Commissioner.

Section 95 provides that Act applies in relation to a deceased individual who has been dead for 30 years or less, in the same way as for a living individual so far as it is reasonably capable of doing so. In addition, legal representatives of a deceased individual may give consent or exercise a right of access on behalf of the deceased individual.

Section 96 provides that the Act does not affect the law or practice in relation to legal professional privilege.

Section 97 protects a person from liability connected with taking action in good faith in relation to a notice, request, consent or authorisation under this Act. It only applies where the person proves that they did not know, and had no reason to be aware, that the notice, request, consent or authorisation was void or defective.

Section 98 provides that an organisation may seek and act on the advice of a relevantly skilled person for the purpose of performing a function under this Act. For example, an organisation may seek expert advice to determine whether disclosure would prevent a serious and imminent risk to another individual as set out in HPP 2.2.

Section 99 provides that it is the intention of section 8 to alter or vary section 85 of the **Constitution Act 1975**.

Section 100 permits the Governor in Council to make regulations.

PART 9—AMENDMENT OF CERTAIN OTHER ACTS

Division 1—Amendment of Acts other than Health Practitioner Acts

Sections 101 and 102 amend the **Freedom of Information Act 1982** (FOI Act) to incorporate into it some of the access rights available under the **Health Records Act 2001**, so that they are also available in relation to documents held by agencies under the FOI Act.

The FOI Act will continue to apply to requests for access in relation to public bodies. Access is not available under Parts 5 and HPP 6 of the **Health Records Act 2001** to health information held by such bodies (or those bodies who are expressly exempted under section 5(3) or 6 of the FOI Act).

Amendments made to the FOI Act include—

- (a) enabling an individual to request access to documents containing health information about them in the same manner as may be requested for health information by individuals under the **Health Records Act 2001**. Additional rights of access created in addition to those that currently exist under the FOI Act are—
 - a viewing with an explanation about the content of the health information held about an applicant in the case of a health service provider (or in any other case, with the agreement of the organisation); and
 - provision of an accurate summary instead of a copy, with the agreement of the organisation (see the amendments to section 23 (1) of the FOI Act in section 101(1)(c));
- (b) the inclusion of a new sub-section 33(4) into the FOI Act so that the threshold for refusing access to an individual who requests health information about him or herself is that access would pose a serious threat to the life or health of that person. If the decision maker believes this is the case, access must be refused. The procedure set out in Division 3 of Part 5 of the **Health Records Act 2001** would apply in such a case. (Refer to section 101(2));
- (c) the internal review mechanisms and the Tribunal appeal rights under the FOI Act remain. Section 102 provides that where an applicant wishes to challenge a decision to

refuse access to health information under the FOI Act, that person may, in some instances, elect to seek conciliation by the Health Services Commissioner instead of seeking internal review by the public sector agency.

Relevant provisions of Division 3 of Part 6 of the **Health Records Act 2001** in relation to conciliation apply for this purpose;

- (d) section 101 (1)(d) amends the FOI Act to require an applicant who is refused access to their own health information to be advised where relevant about the new rights in relation to conciliation by the Commissioner, or to have a decision to refuse access on the grounds of serious threat to his or her life or health discussed with a nominated health service provider.

Aside from the general effect of section 7 of the Act, the Act contains provisions to clarify the interaction between the **Health Records Act 2001** and other Acts that govern the handling of particular classes of health information.

For example, the access provisions in the **Health Records Act 2001** (being Part 5 and HPP 6 and 11) apply to private sector organisations including those that are subject to the confidentiality requirements of section 141 of the **Health Services Act 1988**, section 120A of the **Mental Health Act 1986** or section 16 of the **Intellectually Disabled Persons Services Act 1986**. If an individual applies for access to their health information under the **Health Records Act 2001** from an organisation to which one of these confidentiality sections applies, access must be given if—

- access is required under HPP 6 and Part 5, or HPP 11 of the **Health Records Act 2001**; and
- in the case where either section 141, 120A or 16 also applies to that information, the giving of that information falls within one of the grounds for giving information in that confidentiality section.

(This is achieved by sections 103(1), 109 and 111(1).)

This means that in routine cases where a person applies for health information that only relates to himself or herself and one of these confidentiality sections applies, access must be given in accordance with the **Health Records Act 2001** if that person (or

the guardian of that person) consents to the giving of that information under that section. In the unusual situation where information in that person's record also relates to any other person whose information is subject to the same confidentiality section, the relevant private sector organisation would only be required to give the applicant access to the information about the third party under the **Health Records Act 2001** if that third party consented, or if one of the other grounds in the relevant confidentiality section authorised access.

Sections 103 and 104 make a series of other amendments to section 141 of the **Health Services Act 1988**. That Act provides for the confidentiality of information that could identify patients of certain health services, including public hospitals and private hospitals. The main amendments—

- clarify that the only grounds for giving information under HPP 2 of the **Health Records Act 2001** which authorise the giving of information under section 141 are HPP 2.2(f), 2.2(g), 2.2(h) and 2.5—refer to section 103 (1), (2)(b) and (c) and (4);
- permit the giving of information in certain situations by persons employed or engaged by or on behalf of a public hospital or a denominational hospital by means of an electronic records system where it is established for the purpose of sharing information both in and between public hospitals and denominational hospitals for the treatment of patients. This permission is to be subject to any conditions or requirements set out in regulations (section 103(2) and (5)). The giving of information in accordance with these new sections would amount to the disclosure of information as authorised or permitted by law under Health Privacy Principle 2.2(c) of the **Health Records Act 2001**; and
- create a new offence of unauthorised access to patient information contained in the system referred to above. The information may only be collected or used by a person employed or engaged by or on behalf of a public hospital or a denominational hospital for treatment related activities at that hospital. This permission is to be subject to any conditions or requirements set out in regulations (section 103(3) and (5)). The collection of information in accordance with these new sections would amount to the collection of information as authorised or

permitted by law under Health Privacy Principle 1.1(b) of the **Health Records Act 2001**.

Section 105 makes consequential amendments to the **Health Services (Conciliation and Review) Act 1987**. These amendments are generally designed to ensure that complaints to the Health Services Commissioner about a refusal to provide access, or of breach of confidentiality, are to be dealt with under the **Health Records Act 2001** rather than that Act. This ensures that there is no duplication between these two Acts.

Section 106 amends the **Infertility Treatment Act 1995** to clarify that the confidentiality and access regimes contained in that Act are not affected by the **Health Records Act 2001**. Access requests cannot be made under the **Health Records Act 2001** for information that the **Infertility Treatment Act 1995** provides is only to be available under that Act. In particular, Division 3 of Part 7 of the **Infertility Treatment Act 1995** is to continue to operate unaffected by the **Health Records Act 2001**. However, as is the case with records held in the public sector under the FOI Act, an individual can apply for their own information under the **Health Records Act 2001** from a private sector organisation, provided that the information does not also relate to anyone else. The intention is to ensure that where a person (such as a person born from treatment procedure) would like to obtain information that also relates to someone else (such as a donor) that they may only do so to the extent permitted, and in accordance with, the **Infertility Treatment Act 1995**, as that Act provides a more specialised regime.

Section 107 makes consequential amendments to the **Information Privacy Act 2000** to ensure that there is no duplication in the regulation of the handling of personal information between the two laws. The **Information Privacy Act 2000** already provides that it does not apply to health information, as set out in Schedule 2 of that Act. This section repeals Schedule 2 and amends the definition of "personal information" in the **Information Privacy Act 2000** to ensure that "personal information" in that Act does not include "health information" within the meaning of the **Health Records Act 2001**. This section also ensures that identifiers within the meaning of the **Health Records Act 2001** are not covered by the **Information Privacy Act 2000**.

Section 108 inserts a new section 34A into the **Information Privacy Act 2000** to create a power for the Privacy Commissioner to refer complaints to the Health Services Commissioner where appropriate.

Section 109 consequentially amends the **Intellectually Disabled Persons' Services Act 1986**.

Section 110 makes a consequential amendment to the **Magistrates' Court Act 1989**, to ensure that the offence of failing to comply with a compliance notice is an indictable offence that is triable summarily.

Sections 111 and 112 amend section 120A of the **Mental Health Act 1986**. Section 120A currently makes it an offence to give information which could identify a person who has received treatment for a mental disorder in certain mental health services, except as outlined in that provision.

The main amendments—

- clarify that the only grounds for giving information under HPP 2 of the **Health Records Act 2001** which authorise the giving of information under section 120A are HPP 2.2(f), 2.2(g), 2.2(h) and 2.5—refer to section 111(1), (2)(a) and (b) and (4);
- permit the giving of information in certain situations by persons employed or engaged by or on behalf of an approved mental health service by means of an electronic records system that is established for the purpose of sharing information both in and between approved mental health services for the treatment of persons with a mental disorder. This permission can be made subject to any conditions or requirements set out in regulations (section 111(2) and (5)). The giving of information in accordance with these new sections would amount to the disclosure of information as authorised or permitted by law under Health Privacy Principle 2.2(c) of the **Health Records Act 2001**; and
- create a new offence of unauthorised access to patient information contained in the system referred to above. The information may only be collected or used by a person employed or engaged by or on behalf of an approved mental health service for treatment at or by

that service. It can also be accessed where necessary for the performance of powers, functions or duties of the Chief Psychiatrist, the Mental Health Review Board or the Forensic Leave Panel. Permission under this section can be made subject to any conditions or requirements set out in regulations (section 111(3) and (5)). The collection of information in accordance with these new sections would amount to the collection of information as authorised or permitted by law under Health Privacy Principle 1.1(b) of the **Health Records Act 2001**.

Sections 113 and 114 amend the **Ombudsman Act 1973** to allow the Ombudsman to refer complaints and communicate information to the Health Services Commissioner.

Section 115 amends the **Parliamentary Committees Act 1968** to confer responsibility on the Scrutiny of Acts and Regulations Committee of Parliament to consider future legislative proposals for any adverse effects on privacy of health information.

Section 116 amends section 21 of the **Subordinate Legislation Act 1994** to enable the Scrutiny of Acts and Regulations Committee of Parliament to report to each House of the Parliament about a statutory rule that the Committee considers unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information.

Section 117 inserts a new Part 5B into Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998** to manage actions which are brought in the Tribunal arising under the **Health Records Act 2001**.

Division 2—Amendment of Health Practitioner Acts

This Division makes consequential amendments to the following Acts that provide for the registration and discipline of various categories of health practitioners—

Chinese Medicine Registration Act 2000 (sections 118 and 119)

Chiropractors Registration Act 1996 (sections 120 and 121)

Dental Practice Act 1999 (sections 122 and 123)

Medical Practice Act 1994 (sections 124 and 125)

Nurses Act 1993 (sections 126 and 127)

Optometrists Registration Act 1996 (sections 128 and 129)

Osteopaths Registration Act 1996 (sections 130 and 131)

Physiotherapists Registration Act 1998 (sections 132 and 133)

Podiatrists Registration Act 1997 (sections 134 and 135); and the

Psychologists Registration Act 2000 (sections 136 and 137)

The main changes made by the amendments are to enable the relevant registration boards to—

- refer a complaint that it receives about a practitioner to the Health Services Commissioner in appropriate cases; and
- accept a complaint about practitioner referred to it by the Health Services Commissioner.

SCHEDULE 1

THE HEALTH PRIVACY PRINCIPLES

Principle 1 governs the collection of health information. It provides that an organisation may only collect health information that is necessary for its functions. The circumstances outlined in one of the paragraphs of HPP 1.1 must also apply. For instance, the organisation must have the individual's consent to collect the information or, alternatively, its primary purpose for collecting the health information must fall within one of the other paragraphs in this principle.

HPP 1.3 provides that if it is reasonable and practicable to do so, an organisation must only collect health information about an individual from that individual. This applies in all contexts, including the delivery of health services to an individual. However, where health services are being provided to an individual, it may not be practicable or reasonable to obtain information necessary to provide treatment or services from the individual, for example where the information relates to a diagnosis to be made by a qualified practitioner, or where an organisation gathers the information internally (such as where a hospital uses the skills and knowledge of its staff to observe and monitor a patient and takes this information into account in treating that patient).

HPP 1.4 provides that if information is collected from the individual, the organisation must take steps that are reasonable

in the circumstances to ensure that the individual knows who is collecting their information, the purpose of collection, and the main consequences if the information is not provided. The organisation must also inform the individual that they may have access to it.

HPP 1.5 provides that where information is collected from a third party, it must take steps that are reasonable in the circumstances to ensure that the subject of the information is, or has been, made aware of the matters listed in HPP 1.4.

Principle 2 governs the use and disclosure of information. In general, organisations must only use or disclose health information for the primary purpose for which it was collected in accordance with HPP 1.1.

However, they are entitled to use or disclose health information for a secondary purpose that is spelt out in HPP 2.2. Information may also be used or disclosed with the consent of the individual (HPP 2.2(b)) or where it is directly related to the primary purpose of collection and the use or disclosure is within the reasonable expectation of the individual (HPP 2.2(a)). The latter would be the case, for example, where the information was used to bill an individual for the services they had received.

Secondary uses and disclosures are also permitted in cases where there is a strong public interest in doing so. Paragraphs (c) to (l) set out the permissible public interest grounds for secondary use or disclosure without the individual's consent or reasonable expectation. These grounds do not require an organisation to use or disclose information, but rather permit the organisation to do so if it wishes.

These public interest grounds include, for example, where there is a serious and imminent threat to the life, health, safety or welfare of any person (2.2(h)) or for research in the public interest (2.2(g)). Each of these is subject to additional provisions that must be followed in the absence of consent. The use or disclosure must be in accordance with relevant guidelines of the Health Services Commissioner made under Part 4. For example, it is envisaged that the Commissioner will prepare guidelines about appropriate research protocols for the use of identifying health information.

HPP 2.2(f) permits the use and disclosure of health information for the purposes of activities such as quality assurance, and the funding and planning of health services (eg funding of public hospital services) in limited circumstances. This provision only applies to two categories of information. The first is where the organisation has taken reasonable steps to de-identify the information (but where, for instance, there may be a remote risk of identification that cannot reasonably be removed). It also applies where the purpose cannot be served by using de-identified information and it is impracticable for the organisation to obtain the individual's consent.

In such cases the information can be used or disclosed if any additional requirements under relevant guidelines issued or approved by the Health Services Commissioner are satisfied. Also, if any information is to be published, it must not be published in a form that could reasonably be expected to identify an individual.

This principle also permits the secondary use or disclosure of health information by a health service provider in a number of situations, including—

- with consent (express or implied) given by the individual at the time the organisation collected the information (HPP 2.1/ HPP 1.1(a)) or subsequently (HPP 2.2(b));
- if it would reasonably be expected by the individual and is for a purpose which is directly related purpose to the purpose for which it was collected (HPP 2.2(a));
- with the consent of the individual's authorised representative such as a guardian where the individual is incapable of consenting (HPP 2.1/1.1(a) or HPP 2.2(b), together with section 85);
- where the use or disclosure is required, authorised or permitted (whether expressly or impliedly) under another law. For example, section 141 of the **Health Services Act 1988** is a confidentiality provision that applies to public and private hospitals, and it permits the disclosure of information in a number of circumstances. Section 120A operates in a similar way in relation to disclosure of information by approved mental health services. (The disclosure of information

in accordance with provisions of this kind is not intended to breach HPP 2);

- if there is a serious and imminent threat to the life, health, safety or welfare of the individual (HPP 2.2(h)); and
- if the individual is not capable of consenting and it is not reasonably practicable to obtain the consent of that person's authorised representative (or there is no authorised representative), where the use or disclosure is reasonably necessary for the provision of the health service (HPP 2.2(d)).

In addition, under HPP 2.2(e) a health service provider may use (but not disclose) information to provide a further health service to the individual if its use is reasonably necessary to ensure that those services are both safe and effective, and the information is used in accordance with any guidelines of the Health Services Commissioner. This would include the consideration of information contained on an organisation's file about the medical history of a patient, where its use is reasonably necessary to either safely or effectively treat a patient (or both). Guidelines may be developed to deal with the handling of especially sensitive health information.

Paragraphs (i) and (j) of HPP 2.2 give some latitude to organisations disclosing health information to law enforcement agencies. However, in the case of registered health service providers the use or disclosure is only authorised under these paragraphs where it would not amount to a "breach of confidence". This refers to the general law of confidence (including but not limited to the common law or in equity), which provides, amongst other things, that a duty of confidence exists under that law which is not, in the particular circumstances, outweighed by any countervailing public interest under that law.

Principle 3 requires that health information held by an organisation is accurate, complete and up to date and relevant to its functions and activities.

Principle 4 requires under sub-principle 4.1 that organisations protect health information they hold from misuse, loss, unauthorised access, modification or disclosure.

HPP 4.2 generally prohibits a health service provider from destroying or deleting health information about an individual until at least 7 years has elapsed since the individual's last attendance. In the case of information collected while an individual was a child, it must be kept at least until that individual has attained the age of 25 years (ie seven years after the eighteenth birthday). In the case of childhood records, if the individual keeps attending the health service provider after turning 25, all of his or her information (including the childhood records) must be retained for 7 years from the last attendance.

This duty to retain health information applies whilst a person continues to be a health service provider, for the purposes of the Act. It does not apply to a person who has ceased to be a health service provider, or a legal representative of a deceased health service provider.

The duty to retain does not apply where the **Public Records Act 1973**, the regulations or any other Act specifies a minimum period of retention that is of a longer or shorter duration.

Organisations that are not health service providers do not have the same duty to retain health information. These other organisations are required to take reasonable steps to permanently de-identify health information or destroy it when it is no longer needed for the purpose for which it was collected or any other purpose authorised by this Act, the regulations or any other law. This minimises the risk of misuse or unauthorised access. However, it is intended to allow retention for legitimate purposes such as use of information to defend a legal action that may arise.

Principle 5 encourages transparency by requiring organisations to document clearly their policies on management of health information and to make those policies available to the public. An organisation must take reasonable steps to let a person know in general terms, on request, the sort of health information that it holds about the individual, the purpose for which it is held and how it collects, holds, uses and discloses that information. This is not intended to be required where this would, for example, put the individual or another person at risk, or would prejudice law enforcement functions carried out by law enforcement agencies.

Principle 6 provides individuals with a right to access their health information and make corrections to it, where necessary. The **Freedom of Information Act 1982** already provides a right of access to documents held by Government, statutory bodies and other specified organisations carrying out public functions. This principle does not supplant or apply concurrently when either an organisation or a document falls under the FOI scheme. Accordingly in the case of public sector agencies, the FOI Act will continue to be the only enforceable method of access. This is achieved by sections 8(2) and 16.

Principle 6 applies to private sector organisations (including most contracted service providers acting under State contracts). It applies to such organisations when they hold health information, provided the document is not subject to the FOI Act because it is also a document of an agency or a Minister within the meaning of that Act. Private sector organisations are required to provide access to health information subject to the Act unless one of the paragraphs in HPP 6.1 applies. The method of requesting access and responding to a request is specified further in Part 5 (in the main body of the Act). Part 5 and Principle 6 are to be read together. For example the ground for refusal in 6.1(a) due to a serious threat to the life or health of a person relates to section 26. If the serious threat is to the individual who is seeking access, Division 3 of Part 5 applies.

Subject to section 26 and 27 and other laws that require access to be refused, the paragraphs set out in HPP 6.1 permit access to be refused but do not require refusal.

HPP 6.1 sets out various situations where an organisation may lawfully deny an individual access to information that they have sought under the Act. For instance, when information is subject to legal professional privilege. This applies whether the privilege belongs to the organisation from whom access has been sought, or any other organisation (HPP 6.1(c) and section 96).

Principle 6.2 states that in cases where access would reveal evaluative material in connection with a commercially sensitive decision-making process, the organisation can give the individual an explanation rather than direct access. Otherwise sections 29, 34 and 35 specify how an organisation must provide access if asked.

HPPs 6.5 to 6.9 outline the way in which an individual may request that their health information be corrected.

An organisation is required to take reasonable steps to correct health information it holds in a document if the individual establishes that the information is inaccurate, incomplete, misleading or not up to date. HPP 6.9 allows a maximum of 30 days for the individual to be notified of the outcome of the request.

If the organisation and individual disagree as to whether health information needs correction, reasonable steps must be taken to associate the individual's statement with the health information (HPP 6.6). This could be carried out by including the statement in the file with a note that it represents the individual's views or by attaching the statement to the file.

Where practicable an organisation is required to record the date, and who made, the correction (HPP 6.8). It is also required to take reasonable steps to notify health service providers who have received the health information prior to correction who may be reasonably expected to rely on that information in the future.

Principle 7 imposes limits on the assignment, use and adoption of unique identifiers. For instance—

HPP 7.1 provides that all organisations must have a clear and definite need for an identifier before one may be assigned.

HPP 7.2 limits the circumstances where a private sector organisation may adopt an identifier that was assigned by a public sector organisation for its own operational purposes.

HPP 7.3 allows a private sector organisation to hold, use and disclose identifiers that were assigned by a public sector organisation but only where this is with the individual's consent, or is necessary for a purpose that is legitimate under HPP 2.2(c) to (l). It is also permissible to disclose it to a public sector organisation to enable it to identify the individual (eg a private practitioner writing to a public hospital about a patient who is being treated at the hospital can refer to the hospital's universal records number in correspondence with that hospital.)

HPP 7.4 includes additional provisions that apply where a private sector organisation uses, discloses or adopts an identifier assigned by public sector organisation to fulfil obligations to that public sector organisation.

Principle 8 preserves, where lawful and practicable, the right of individuals to remain anonymous in transactions with an organisation.

Principle 9 puts limits on the transfer of information to another organisation outside Victoria. For example, an organisation is only allowed to do so if it reasonably believes the recipient is subject to a law, or other binding obligation, which imposes restrictions on the handling of that information which are substantially similar to the Health Privacy Principles. Health information may also be transferred with the individual's consent, if the transfer is necessary for the performance of a contract or as required or authorised by law.

For such a transfer to another organisation to be legitimate, it must also comply with the restrictions about use and disclosure that are specified in HPP 2.

Principle 10 regulates what a health service provider must do with its stock of records when the practice or business—

- is sold, transferred or amalgamated (and the provider will not be providing health services in the new practice or business); or
- is closed down.

It requires a notice to be published in a local newspaper giving notice to patients and former patients that the practice is transferring or closing, so that they may apply for their information before the practice closes. The provider can indicate whether or not it wishes to retain the health information or pass it on to patients or to their new practitioner.

If the provider elects to retain the information, and an individual requests that the information be given to him or her, the provider may keep the information but must treat the request as an application for access under Part 5 or and HPP 6 (ie give the individual a copy, summary, inspection or explanation of the information, as appropriate). If the individual has requested that the information be given to another practitioner (such as his or

her new practitioner) then the information (but not the original records) must be made available to that other practitioner in accordance with HPP 11.

This principle also applies where a practice closes due to the death of a practitioner. The duties regarding notification of patients and providing access apply to a legal representative such as an executor.

The purpose of this provision is to encourage individuals to apply for their health information whilst it is still readily available. (For example, if a practice closes because a practitioner has died or where a practitioner is moving interstate, access may not be possible subsequently.)

Principle 11 provides individuals with a right to have their health information that is held by a health service provider made available to another health service provider. Since the disclosure is from one health service provider to another, the grounds to refuse access that apply under Part 5 and Principle 6 do not apply.