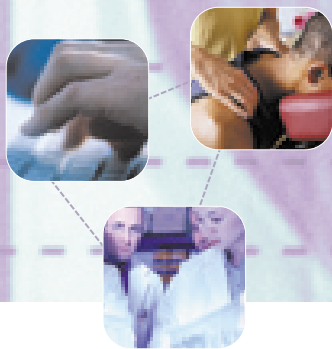


Health Privacy it's my business



Health Records Act

Health Privacy Principles

Right of Access

Information Sheet No. 5

Minors, Privacy Laws & Consent

Key Message

Children have the right to privacy of their health information and to make their own decisions regarding their privacy where they are competent to do so. Parents and guardians do not have automatic access to all health information relating to a child in their care.

Purpose

This information sheet provides guidance to holders of health information (including health service providers, schools, kindergartens, fitness centres, employers and government agencies) in relation to safeguarding the privacy rights of children, particularly when using or disclosing a child's health information or providing access to it.

Information relating to the Commonwealth legislation is included in italics.

Organisations and consumers need to be aware that the Privacy Act 1988 (Cwth) which includes the 10 National Privacy Principles (NPPs), regulates the handling of personal information, including health information, in the Commonwealth public sector and in the private sector (including the private health sector) across Australia.

Capacity to consent

Determining the competence of a minor to consent can be complex. A minor is capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. This test comes from the English case of *Gillick v West Norfolk AHA* (1986) 1 AC 150 which has been applied for many years when providing health services to minors.

A child's consent may be overridden by a court order on the basis of the 'child's best interests'.

Privacy rights

The *Health Records Act* 2001 (HRA) defines a child as being a person under the age of 18 years but does not specify the age individuals may be considered capable of giving consent. A child, like any other person, has a right to the privacy of their information. They can also exercise a right of access to their health information depending on their capacity to consent.

A parent's right to make decisions about their child's health information ceases once the child is 18, when the child becomes legally entitled to make their own decisions, or earlier if they have the capacity to give informed consent (as per the *Gillick* test above).

The Privacy Act does not define nor does it prescribe the age individuals may be considered capable of giving consent on their own behalf. Guidelines issued by the Federal Privacy Commissioner on the application of the Privacy Act in the private health sector state that:

'determining competence can be complex, such that the health service provider must have regard to the maturity of the young person and their understanding of relevant circumstances. In certain circumstances, young persons will have attained sufficient competence (maturity and understanding) to make their own decisions. Conversely there will be older teenagers who lack such competence. Nevertheless their views must be considered too. Health service providers will need to deal with each case subject to its circumstances.'

Specific obligations

HPP 6 provides individuals with a right to access and make corrections to health information about them where necessary, subject to any laws that may restrict access rights.

HPP 4.1 requires organisations to protect health information they hold from misuse, loss, unauthorised access, modification or disclosure. If a child is competent to give informed consent then releasing that child's health information, even to a parent, may be an interference with the child's privacy.

HPP 4.2 prohibits a health service provider from destroying or deleting health information about an adult until at least 7 years after their last attendance to the health service provider. Information collected whilst an individual is a child must be kept until the individual turns 25 (i.e. seven years after their 18th birthday).

An organisation subject to the *Public Records Act 1973* or any other Act or regulation dealing with retention of information must retain information in accordance with the requirements of that Act or regulation not the *Health Records Act*.

Organisations that are not health service providers, such as schools, have different legal obligations concerning retention of health information. If they are not subject to other specific legislation such as the *Public Records Act* they are required to take reasonable steps to permanently de-identify or destroy the health information once it is no longer needed for the purpose for which it was collected, or any other purpose authorised by any law.

Duties imposed by other statutes

The HRA does not override other legislation. Specific provisions in other legislation override the more general provisions in the HRA.

Under the *Family Law Act 1975* (Cwth) the Family Court of Australia can order who is able to give consent on behalf of a child that lacks the capacity to consent. It may be prudent to ask parents whether there are any orders relevant to the organisation's activities e.g. processing a request for access from a parent.

Section 64 *Children and Young Persons Act 1989* compels certain professionals to disclose information to the Department of Human Services where they suspect child abuse.

About information sheets

Information sheets are advisory only and do not constitute legal advice nor are they law.

They are intended to help organisations apply the HPPs in everyday or practical circumstances. Organisations may need to seek separate legal advice on the application of the *Health Records Act* to a particular situation.

Nothing in an information sheet limits the Health Services Commissioner's powers to investigate complaints under the Act or to apply the HPPs in the way that seems most appropriate to the facts of any case being dealt with.

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MORE INFORMATION:

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