

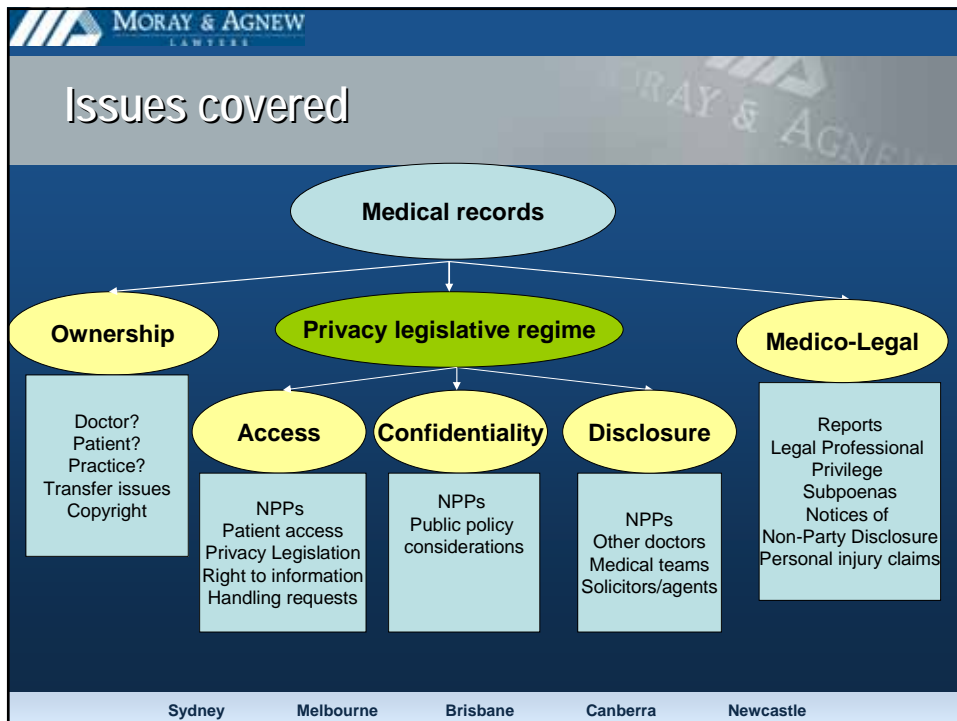
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AAPM staff development day: "Who owns the medical records and who has the right to access it?"

Sarah Von Rurik, Moray & Agnew Lawyers
on behalf of MDA National

15 May 2010

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What constitutes a 'medical record'?

- **The written records of a medical practitioner relating to the consultations by, and treatment of, a patient.**
- Medical records are:
 1. The property of the practitioner or the medical establishment treating the patient.
 2. Confidential - however, they are admissible as evidence, and may, on sufficient grounds, be subpoenaed by a court.
 3. The patient has no general right of access to medical records compiled by a doctor in relation to that patient: *Breen v Williams (1996) 186 CLR 71.*


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More definitions to remember

- **'Health records'** = documents, recording the health history, condition and treatment of users of the professional services provided by a person, made in the course of the person's practice of the profession. *Medical Practitioners Registration Act 2001 (Qld)*
- **'Health information'** pursuant to section 6 of the *Privacy Act 1988 (Cth)*. It is
 - '(a) information or an opinion about:
 - (i) the health or a disability (at any time) of an individual; or
 - (ii) an individual's expressed wishes about the future provision of health services to him or her; or
 - (iii) a health service provided, or to be provided, to an individual; that is also personal information; or
 - (b) other personal information collected to provide, or in providing, a health service; or
 - (c) other personal information about an individual collected in connection with the donation, or intended donation, by the individual of his or her body parts, organs or body substances.'


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Starting point on ownership and right of access of medical records by patients: *Breen v Williams*

- 1996 High Court decision
- Facts:
 - Ms Breen, sought access to the records of Dr Williams, a plastic surgeon who had provided advice and treatment to her in relation to silicone breast implants.
 - She wanted to sue the manufacturer of the breast implants and believed that Dr Williams records would be relevant to the proceedings.
 - There was no suggestion of inappropriate treatment by Dr Williams by Ms Breen.
 - Although Ms Breen could have applied for the Court's leave to obtain access to the medical records by way of subpoena, Ms Breen wanted to test whether there was a right to access her records independently of a court subpoena.
 - Did there exist a common law right of access to medical files?


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Breen v Williams continued...

- Unanimously held that in the absence of a subpoena ordering the doctor to provide access, **a patient has no right to access his or her medical records**
- Ms Breen did not own nor was she entitled to the medical records that Dr Williams had created in relation to his treatment of her
- Medical records were "*the sole property of the doctor who held all rights associated with ownership and that the records remained the intellectual property of the medical practitioner who had written them*"


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Exceptions to the rule in *Breen v William*

- Investigative reports such as pathology and radiology reports - Owned by the patient or the organisation paying for the investigation to be conducted

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Ownership where a doctor is leaving a practice

The case of *Health Services for Men Pty Ltd v D'Souza*

- Health Services for Men Pty Limited ("*Health Services*") was a company that operated a group of 21 clinics around Australia
- In each clinic the company leased premises, equipped and staffed them and engaged medical practitioners to treat patients who attended the clinic
- The company attracted patients to the clinics by advertising and providing a 1300 number that potential patients could call. Upon receiving calls, the company screened the patients using a brief phone interview designed to ascertain their suitability for treatment. Suitable patients were then booked an appointment with whichever doctor was available at their chosen time
- The dispute with *D'Souza* arose when three medical practitioners decided to cease working for Health Services and to set up their own clinic
- These practitioners took a large number of patient files with them
- Who owned medical records in a medical practice that was run and serviced by an incorporated entity? The treating doctor or the practice?**

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D'Souza

- Medical records owned by the practice
- Reasoning?
 - Most or all of the patients attending the clinic did so in response to the company's advertising and did not seek any particular doctor for treatment
 - Patients attending the clinic did so at the invitation of the company after the phone interview
 - On each visit, patients saw whichever doctor was rostered on, and often saw different doctors at each visit


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Ownership of medical records in a multi-practitioner practice

- *Mid-City Skin Cancer & Laser Centre Pty Limited v Zahedi-Anarak* [2006] NSWSC 844
- Facts:
 - Dr Zahedi was engaged as a contractor on a sparse written contract in return for a percentage of his Medicare billings
 - Dr Zahedi commenced practicing at the clinic and by the end of his third year at the practice, Dr Zahedi was the biggest fee earner in the practice.
 - Many of the repeat patients deliberately chose to see Dr Zahedi
 - A decision was made to sell the practice approximately four years into the arrangement
 - Dr Zahedi left the practice taking with him a number of pathology reports and photocopied patient booking sheets which contained contact details for the patients


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Held

- The Court decided:
 - Pathology reports (as a Medicare Bulk Billed Item) = property of the patient to whom the report related, and that the practice retained rights to a copy of that report for the purpose of providing treatment
 - Booking sheets = property of the clinic on the basis that the clinic paid for and printed the stationery on which they were produced, and nothing in the relationship suggested any intention to transfer that property


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Medical records forming part of a deceased estate

- The Medical Board can accept health records from the estate of a deceased practitioner
- Abandonment of medical records? = The Medical Board takes possession
- Chapter 10 of the *Medical Practitioners Registration Act 2001* (Qld)


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Final word on ownership?

- Uncertainty surrounding the ownership of medical records, particularly in multi practitioner practice largely stems from a failure to adequately describe the intentions and circumstances of the medical practitioners in a formal written agreement


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Confidentiality

- Privacy Act regulate the handling of personal information and health information through the enforceable NNPs.
- There is also a separate legal duty of confidentiality which obliges health care practitioners to protect their patients against the inappropriate disclosure of personal (health) information
- The Australian Medical Association (AMA) Code of Ethics requires medical practitioners to maintain a patient's confidentiality.
 - *'Exceptions to this must be taken very seriously. They may include where there is a serious risk to the patient or another person, where required by law, or where there are overwhelming societal interests.'*


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Exceptions to maintaining confidentiality

- . Consent
- . Overriding public interest
- . Where there is a serious risk to a patient or another person.
- . Where required by law.


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Compelling disclosure of medical records, required by law

- . Medical records can be the subject of subpoena, search warrant or a notice of non-party disclosure where such are available under legislation and the court process
- . Where litigated proceedings have been commenced against a medical practitioner, records are required to be disclosed where:
 - . Relevant to a matter in question in the proceedings
 - . In the possession or control of the registrant
 - . Able to be produced at trial
- . Medical practitioners are advised to seek legal advice or advice from their insurer if they are not sure about handing over the record


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The legislative framework governing confidentiality, access & disclosure

- *Privacy Act 1988 (Cth)* ('**Privacy Act**') provides a statutory right of access to information about individuals held by private health care service providers across Australia.
- The Privacy Act also established the National Privacy Principles ('**NPPs**').
- *Information Privacy Act 2009 (Qld)* ('**IP Act**') – provides a formal mechanism for a person to apply to access or amend their own personal information
- *Right to information 2009 (Qld)* ('**RTI Act**')– grants the public a general statutory right to access documents held by public agencies subject to considerations of public interest. Includes public hospitals and community health centres


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National Privacy Principles (NPPs)

- Queensland Health is required to comply with nine (9) NPP that set out how personal information must be collected and managed in the public health sector environment
- The NPPs have been in operation in Queensland since 2001 under the administrative privacy regime established by Information Standard 42A (IS42A)
- Office of the Privacy Commissioner
<http://www.privacy.gov.au/>


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What are the NPPs?

- . NPP 1 - Collection
- . NPP 2 - Use and disclosure
- . NPP 3 - Data quality
- . NPP 4 - Data security
- . NPP 5 - Openness
- . NPP 6 - Access & correction
- . NPP 7 - Identifiers
- . NPP 8 - Anonymity
- . NPP 9 - Transborder data flows
- . NPP 10 - Sensitive information


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NPPs 1 & 2

- . NPP 1 sets out that a patient must give implied or express consent for their personal information to be collected
- . NPP 2 use & disclosure - secondary disclosure – patient care, medical research?
- . Disclosure without consent is permitted in certain circumstances i.e. to lessen a serious and imminent threat to an individual's life, health or safety; or where the disclosure is required or authorised by law.
- . Private sector health service providers do not always require a patient's consent to disclose specific health information to another member of a multidisciplinary team for a health care purpose, as long as the patient would reasonably expect that disclosure.
- . However it is advisable to gain patient consent to avoid relying on implied consent.


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Access - NNP 6

- An organization which holds personal information about an individual, must provide the individual with access to the information on request by the individual, except in certain circumstances
- An organization does not have to give access if:
 1. it would be unlawful to provide the information;
 2. it would pose a serious and imminent threat to the life or health of any individual;
 3. it would have an unreasonable impact upon the privacy of other individuals; or
 4. the request is frivolous or vexatious


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Handling requests by patients

- Patients do not have to give reasons for requesting access. However, the scope of the request may need clarifying so that the access granted is appropriate, which may not necessarily involve providing a copy of the whole of the patient file
- Develop a policy about handling access requests
- Patients cannot be required to make their requests in writing, though in some cases it may be prudent to ask the patient to do so
- A request for access should be noted on the patient's file. All requests should be referred to the treating doctor
- Granting access should not ordinarily exceed 30 days


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Checklist for granting access

1. Clarifying the scope of the request may be necessary - whether the whole file is required, or just certain parts.
2. Ensure the person seeking access has legal authority to do so or the consent of a person who has that right
3. Acknowledge the request and indicate likely costs. In most cases, this acknowledgment should be issued within 14 days of receiving the request for access
4. Refer the request to the treating doctor or privacy officer for approval and action
5. Collate requested information


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Checklist for granting access cont.

6. Treating doctor or privacy officer to assess information to make sure that no part should be withheld due to any provisions under NPP 6
7. Delete or remove any information which should be withheld under NPP 6. All deletions should be made from the copy of the information which the patient will get, NOT ON THE ORIGINAL MEDICAL RECORD
8. Consider copyright implications of doctor's work, and note any restrictions on further publication
9. Once cleared for access, provide information in most appropriate form, taking into account wishes of individual.
10. If information is withheld, give reasons
11. Note on the patient file that access has been granted, or refused as appropriate


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Requests by solicitors and / or patient's agents

- Seek clarification of the nature of the request
- Request payment of reasonable administrative costs incurred in reviewing the notes and for photocopying


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Information contained in medico-legal reports

- Opinions expressed in medical reports prepared at the request of lawyers on behalf of clients form part of the health record to which Privacy Act applies.
- The intellectual property rests with the author of the report.
- Legal professional privilege

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QUESTIONS?

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