Professional risks & responsibilities
Privacy

Privacy and data security are hot topics at the moment, with Australia seeing multiple high-profile data breaches in recent years. It's also an important topic for health practitioners because health information is in the most sensitive categories of information and therefore gives rise to the most onerous responsibilities.

The privacy legal framework can be a bit complicated to navigate because there are multiple pieces of legislation that can apply depending on things like your state, whether you are in private or public practice and the size of your organisation. The good news is that the issues and obligations relating to privacy and health information are substantially the same whatever the location or situation.

What information needs to be protected?

It's important to define what kind of information gives rise to privacy and confidentiality obligations and, for health practitioners, the key ideas are 'personal' information and 'health' information:

- Personal information is defined as an identified individual, or an individual who could be reasonably identified. This means any information about a particular person, such as name, address, contact details, etc.
- Health information is a sub-category of personal information, such as treatment wishes, genetic information and even billing details in some circumstances.

Other sub-categories of personal information can include:

- 'sensitive information' – which includes information about an individual's racial or ethnic origin, political and religious beliefs, sexual orientation, criminal record and the like;
- Credit information;
- Employee record information; and
- Tax file number information.

All of the above types of information give rise to privacy obligations, including around how the information is collected and stored, how access and disclosure is managed and how the information must be protected.

It is critical to understand that the privacy obligations attach to the type of information, not how it is recorded or stored.

That means any type of record is relevant if it holds information and the obligations around security, disclosure, access all apply. This includes text or instant messages, emails and the like.

Your privacy obligations

As noted, the specific obligations vary from jurisdiction to jurisdiction and are normally defined in legislation or in associated instruments known as Health Privacy Principles.

Some of the key obligations which are common across the different legal frameworks reate to:

1 The use and disclosure of information;

2 The quality of information;

3 Access to information; and

4 The security of information.

Use and disclosure of information

The most important obligation is that health practitioners cannot collect, use or disclose the information for any purpose other than the one it was collected for (which would normally be to provide OT advice and treatment).

However, there are some exceptions to this, including where:

- The individual consented to a secondary use or disclosure. It's important to keep in mind that we are talking about express and specific consent to collect, disclose or share the information.
- The individual would reasonably expect the secondary use or disclosure, and that is related to the primary purpose of collection or, in the case of sensitive information, directly related to the primary purpose. This might include sharing the information with other treaters but it is best practice not to assume the individual expects this and to get specific consent to do so.
- The secondary use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order. This is why health practitioners must comply with Court subpoenas.
- There is a serious threat to the life or safety of any person, or to public health and safety, and it is unreasonable or impractical to get consent from the individual.

Quality of information

In terms of the quality of information being held, practitioners are obliged to take reasonable steps to ensure that the information collected or disclosed is accurate, up to date and complete.

Access to information

Practitioners are obliged to provide access to an individual's information that they hold. Usually this means providing copies of the records on request but it can also mean providing a written summary of their history and treatment.

Again, it is important to remember that communications like text or instant messages, emails and the like can all contain health information and are technically part of the patient's record and therefore subject to the access requirements.

Security of information

A practitioner must take 'reasonable steps' to protect the information from misuse, interference and loss, and from unauthorised access, modification or disclosure.

Unfortunately, there is no hard and fast rule about what constitutes 'reasonable steps' to protect the information but this generally turns on how sensitive the information is and the consequences for the individual if it's disclosed. For example, health information falls into the highest category of sensitivity and risk and therefore carries the highest level of obligation in terms of security.

People often think about information security in the context of the organisation's internal networks and databases but it is important to remember that devices like laptops, tablets and mobile phone can all contain sensitive information and are subject to the same security requirements.

What happens in the event of a data breach?

What a practitioner should do in the event of a data breach, or breach of their privacy obligations, can vary depending on the circumstances but there can often be an obligation to inform the individual and even self-report to the relevant body. So, if you are worried about a potential problem, it is very important to seek formal advice as soon as possible.

There can be very significant financial penalties for individuals and obligations who fail to meet their privacy obligations, as well as possible professional consequences from the regulator.

*Disclaimer – this advice is only general in nature and cannot be relied on as formal legal advice. If you require information and advice specific to your own situation, please contact your insurer and/or the OTA

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