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# Municipal Association of Victoria

Privacy, Consent and Documentation  
MCH Conference - 1 March 2019

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# Outline

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- Privacy Framework
  - Health Records Act
  - Privacy and Data Protection Act
  - Council Policies
- Health Records Act
  - Consent
  - Use and Disclosure of health records
  - Documentation
- Insurance and Notification of claim circumstances

# Health Records Act

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Fair and responsible handling of **health information** by:

- **protecting** the privacy of the individual's health information
- providing individuals with a **right of access** to their health information; and
- providing an accessible framework for the **resolution of complaints** regarding the handling of health information

# Privacy and Data Protection Act

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- Provides for protection of personal information in the public sector.
- Does not apply where the Health Records Act applies.
- Schedule 1 – Information Privacy Principles (IPPs)

# Council Policies

- Written policy required under principle 5 of the Health Privacy Principles
- Generally these will reflect the Privacy and Data Protection Act and the Health Records Act (the IPPs and HPPs contained in those Acts).
- Check your council policies . Does your council have a privacy policy and a health records policy ?
  - They may be combined or separate



# Health Records Act

## Privacy Principles (Schedule 1)

- Collection (principle 1)
- Use and disclosure (principle 2)
- Data Quality (principle 3)
- Data Security and Data Retention (principle 4)
- Openness (principle 5)
- Access and Correction (principle 6)
- Identifiers (principle 7)
- Anonymity (principle 8)
- Transborder data flows (principle 9 )
- Transfer or closure of practice of health provider (principle 10)
- Making information available to another health service provider (principle 11)

# Collection

## Collecting health information – principle 1

- Collect only where individual has **consented**; or
- Required to be collected by law; or
- The information is necessary to provide a health service and the individual is incapable of providing consent (and they do not have an authorised rep or it is not reasonably practicable to obtain consent of an authorised rep)
- The collection is necessary to prevent or lessen:
  - A serious threat to the life, health, safety or welfare of any individual; or
  - A serious threat to public health, public safety or public welfare

**Note :The above covers the main basis upon which collection is permitted but not all.**



# Consent



- What are you obtaining consent for ?

## Health Privacy Principles – 1.4

At or before collection (or if not practicable as soon as practicable thereafter), **collecting health information** the Council must take reasonable steps to ensure the individual is **generally** aware of :

- the identity of the organisation and how to contact it; and
- the fact that he or she is able to gain access to the information; and
- the purposes for which the information is collected; and
- to whom (or the types of individuals or organisations to which) the organisation usually discloses information of that kind; and
- any law that requires the particular information to be collected; and
- the main consequences (if any) for the individual if all or part of the information is not provided.





# Consent

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- What are you **not** obtaining consent for ?
  - Not obtaining consent to provide the service. By attending they are consenting to the service. They can withdraw consent to the service or part of the service at any time.
  - Not obtaining consent as to how you record the information, rather that they consent to collection of information in accordance with the *Health Records Act*.

# Consent – Example



- Example
  - The MCH nurse provides the consent form and information to a parent/guardian on the first visit.
  - The MCH nurse outlines that the information is recorded on a cloud based system.
  - The parent/guardian only agrees to provide consent if the record is not kept electronically ?
  - What do you consider the MCH nurse could have done differently ?
  - If a parent does not provide consent for an electronic record what would you consider in determining whether to agree to this ?

# Use and disclosure

## Use and disclosure (principle 2)

- Can use or disclose for the **primary purpose** for which it was collected
- Can only use or disclose for **secondary purposes** in limited circumstances.
  - The secondary purposes is directly related to the primary purpose; and
  - The individual would reasonably expect the council to use or disclose the information for the secondary purpose



# Use and disclosure (cont)

- Other permitted secondary purposes include:
  - where **consent** is provided
  - Where **required, authorised or permitted by law**
  - For funding, management, planning, monitoring, improving or evaluation of health service (note: conditions apply to this)
  - For training by a health service provider of employees or persons working within the organisation (note: conditions apply to this)
  - For research, or the composition or analysis of statistics, in the public interest (note: conditions apply to this)
  - It is necessary to prevent or lessen
    - » Serious threat to health, life, safety or wellbeing of individual; or
    - » Serious threat to public health, public safety or public wellbeing



Note: the above does not cover all secondary purposes.

# Use and Disclosure – Example 1



- Disclosure for research purposes ?
  - A researcher requests access (a login) to CDIS to access records for research purposes.
  - The researcher is a well regarded and credible researcher.
  - The research will potentially be of significant benefit to the community.
  - The researcher has ethics approval.
  - Is it ok to give the researcher a login to CDIS?

## Use and Disclosure – Example 1 (Cont.)

- Disclosure for secondary purpose – research, compilation, analysis for public purpose, is permitted where:
  - It is impracticable for the organisation to seek the individual's consent before the use or disclosure
  - That the purpose cannot be served by the use or disclosure of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained
  - The use or disclosure is in accordance with guidelines issued or approved by the Health Complaints Commissioner under section 22 – available on Commissioner's website

# Request for documents by third parties and courts

Examples include (but not limited to) :

- Centrelink - legislative power
- Commissioner for Children & Young People – legislative power
- Subpoena by court – order of the court
- Third party discovery – order of the court
- Coroners court – legislative power for investigation and also subpoenas which are court orders
- FOI – Freedom of information Act. FOI officer to review and respond.
- Letter from solicitors for parent in Family law proceedings requesting documents and information (authority)

## Centrelink example

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- Notice pursuant to section 196 of the *Social Security (Administration) Act 1999*
- Document attached outlining
  - Authority to collect the information
  - Notation that there are criminal penalties for failing to provide the information or for providing false or misleading information
  - Your rights and obligations



## Subpoena – example

- The MCH nurse is subpoenaed in a family law case to provide documents and evidence regarding a parent and child.
- What should the MCH nurse/council do ?



# Document/information sharing

- Child Wellbeing and Safety (Information Sharing) Act 2018 amended the following:
  - Child Wellbeing and Safety Act 2005,
  - Children, Youth and Families Act 2005, and
  - Family Violence Protection Act 2008.
- Child information sharing Scheme (Sept 2018)
- Family Violence Information Scheme (Feb 2018) (Sept 2018 for MCH)
- Training being provided by the Department as to the application of this legislation.
- Importance in relation to risk of liability
  - Wellbeing of child
  - Management of family violence risk to adults and children
  - Failure to share information could lead to risk of liability

## Access within council

- Access only where necessary as part of that person's role.
- Limit access to protect the records. (Data Security – principle 4)
- Have strict policies/protocols in place if other areas outside MCH, such as IT or admin require access.



# Documentation - Data Quality

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- Data quality (Principle 3)
  - the health information it collects, uses, holds or discloses is
    - accurate,
    - complete,
    - up to date and
    - relevant to its functions or activities.

This principle is clearly important for the provision of the service and also for risk mitigation.

# Documentation - Data Security and retention

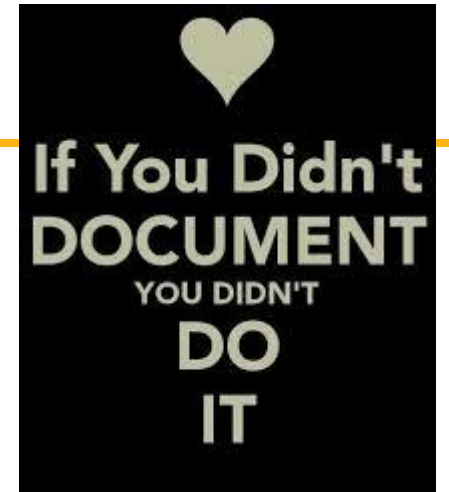
- Data security and retention (principle 4)
  - must take **reasonable steps to protect** the health information it holds from misuse and loss and from unauthorised access, modification or disclosure
  - **must not delete health information** relating to an individual, even if it is later found or claimed to be inaccurate, unless permitted by law or after the required period of document retention.
  - When **transferring health information** to another organisation where council will not continue to hold a record of that information it must make a written note of the name and address of the individual or organisation to whom it was transferred.
  - must take reasonable steps to **destroy or permanently de-identify health information** if it is no longer needed for the purpose for which it was collected or any other purpose authorised by this Act, the regulations made under this Act or any other law.

# Documentation – recommendations

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- Information to be clear and complete
- Identify the nurse recording the information clearly
- Have a clear protocol in place where student nurses enter information which is then checked by supervising nurse
- Record all recommendations provided to parents.
- Record all referrals given and any discussed.
- Record follow up of referrals, recommendations and outcome.
- Be familiar with the MCH Documentation Standards
- Consider how to record information about another person given in confidence

# Documentation



- Examples of risks / potential claims
  - Inconsistent practices
  - Unclear who recorded the information
  - Information not recorded for subsequent nurse to access
  - Previous records not checked at subsequent appointment
  - Actions taken and follow up not recorded. For example referral to another health service.
  - Information recorded in green book but not on CDIS

# Documentation Example 1



- Text / SMS messages
- A MCH nurse is unable to get in contact with a mother that has not attended an appointment. The mother and child are under the enhanced maternal child health programme.
- The MCH nurse sends a text message to the mother and receives a long response by text message.
- **Should the text messages and responses be saved on the file?**





## Documentation – Example 2

- A MCH nurse observes a child's head circumference is 97 percentile, while the child's other measurements are lower at around 50 percentile.
- The MCH nurse discusses with the parent referral of the child to their GP and possibly a paediatrician.
- The parent agrees they will take the child to their GP at first instance.
- The MCH records the child's measurements and a note saying 'discussed with parent'.
- **What are the risks ?**
- **How would you avoid these risks ?**

## Documentation – Example 3

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- MCH nurse creates template notes, which they copy and paste into CDIS and then modify.
- **Is this ok?**

## Documentation – Example 3 (cont)

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- Consider Documentation Standards for Maternal and Child Health Nurses in Victoria (2016)
- Risk – Is it a true and accurate record of the appointment ?

# Insurance and notification

- You must notify your insurer of a claim or circumstances which may give rise to a claim
- Immediately notify your risk manager at council if
  - You are aware a mistake/incident/death/injury has occurred or may have occurred
  - You are contacted by the parents/guardian or their lawyers alleging that council has made a mistake/been negligent (note this will be different to where they may be requesting documents for other purposes such as Family Law proceedings)
  - You receive a FOI request for documents where there is the potential an error has been made
  - You receive a request for information or documents for an inquiry into a death or serious injury



# Key Messages

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- Health Records Act applies to MCH records – get to know the Health Privacy Principles
- You are obtaining consent to collect the person's health information
- Use and disclosure of health records/information is strongly protected.
- Check before using or disclosing MCH records for any purpose other than the provision of the MCH service.
- Document everything – if you didn't document it you didn't do it !

# Questions ?

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