Privacy and personal information protection: a judicial interpretation of a legislative response in NSW

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Introduction

Personal and privacy concerns regarding personal information which is disclosed by consumers to government departments and health care agencies for the purpose of seeking benefits, advice or assistance is a high priority for the consumers, and must therefore be given diligent attention by those who are the recipients of the information. Sensitive and personal information is only disclosed by a person to those who are in many cases a stranger to them in order to obtain the best possible outcome for themselves or their families.

To supplement the legal and ethical obligations of privacy and confidentiality owed by health care professionals and others towards patients, Commonwealth and State governments have enacted, and in some cases, strengthened existing privacy laws. One such Act in New South Wales is the Privacy and Personal Information Protection Act 1998 No 133 NSW (hereinafter referred to as ‘the Act’). The Act defines ‘personal information’ in S4 as: ‘... information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information and opinion’. The definition of personal information includes fingerprints, retina prints, body samples or genetic characteristics. There are some exclusions, including information about an individual who has been deceased for more than 30 years.

The Act provides for the appointment of a Privacy Commissioner, and for the making of privacy-related complaints. The Act also prescribes specific information protection principles and requirements for privacy codes of practice. Whilst a Parliament might enact a specific law, it remains the province of judges to interpret the legislative provisions and apply them to the facts of a dispute which comes before them for determination on a case by case basis. This report will provide an overview of a specific case involving the provision of health care which was decided by reference to the above Act: KD v Registrar, NSW Medical Board [2004] NSWADT 5, heard by the Administrative Decisions Tribunal of NSW.

The facts

KD, the applicant, underwent a procedure conducted by Dr A, a specialist gynaecologist and urogynaecologist, at North Shore Urodynamics Centre in November 1999. She was dissatisfied with her treatment and its consequences and wrote a letter of complaint, dated 29 September 2000, to the NSW Minister for Health. The Minister referred the letter to the Health Care Complaints Commission (HCCC) and the Commission referred the complaint to the NSW Medical Board for investigation. As part of the investigative process, KD provided the Board with further material and a copy of her Medicare Claims history. A letter sent to KD from the Board, dated 24 January, acknowledged receipt of the information and advised her that they would determine if any action was to be taken against Dr A and that she would be advised of the outcome.

As part of the investigation, the Board’s Complaint Co-ordinator wrote to Dr A enclosing a copy of KD’s letter and Medicare history, asking him to comment on the complaint. The Co-ordinator requested a copy of the doctor’s relevant medical records and concluded by advising the doctor that the Board would advise him and the HCCC of the outcome. Dr A responded to the Board’s letter responding to the allegations and forwarded his comments, together with a copy of a letter sent to the HCCC in response to their earlier involvement in the
investigation. He also forwarded the requested medical records of KD.

In March 2001, the Board wrote to KD enclosing a copy of Dr A’s response to her complaint and advised her that the Board had determined there were no grounds to proceed against the doctor. The following month, KD wrote to the Board complaining that she had been informed that copies of her correspondence regarding the complaint had been provided to the doctor without her consent. The Board informed her that as the Board was required to observe principle of natural justice in the course of investigating complaints, the Board had to allow the subject of any investigation to respond to allegations made against him or her.

KD went further and took her complaint of breach of privacy back to the Minister of Health who, in turn, referred the matter back to the Board. KD also made a complaint to the Privacy Commissioner who also referred the matter to the Board for comment. KD sought an internal review by the Board’s Registrar, who wrote to KD providing her with information regarding the course of the review and its results, his decision and the reasons for his decision.

In summary, the Board endorsed the obligation of the Board to apply principles of natural justice during investigations. It also held that KD had not indicated any desire or expectation of confidentiality, and that some of the material she believed had been provided to the doctor had not in fact been sent to Dr A. Although he found that the Board had not contravened the Privacy Act, he acknowledged that the Board could improve its procedures to alert complainants to the fact their correspondence was likely to be forwarded to the subject of the complaint thereby providing the complainant the opportunity of declining to consent to such process before the investigative process was continued. On behalf of the Board, the Registrar recommended that a formal apology be offered to KD for the distress caused to her upon becoming aware that her letters had been forwarded to Dr A.

The case
KD filed for a review of the Board’s conduct to the Administrative Decisions Tribunal of NSW. Medical evidence of the shock, anxiety and stress, exacerbating KD’s condition of chronic pain was given to the Tribunal. There was evidence that KD had agreed by telephone to forward the Medicare claims history to the Board for their files. She agreed that that the Board’s Complaint Co-ordinator advised her of her intention to write to Dr A regarding the complaint but believed the claims history was for their information only.

As part of the discussion of the relevant law, the Tribunal referred to the obligation of the HCCC and the Board to notify each other of complaints received by either. Under the Health Care Complaints Act 1993, the Commission has the power to investigate matter of complaint against a health professional’s conduct if it deems such is appropriate. By virtue of S47 of the Medical Practice Act, the Board must notify, in writing, the person against whom a complaint is made ‘as soon as practicable after the complaint is made’, the fact and nature of the complaint, and the identity of the complainant, unless this is likely to prejudice the investigation or act to the detriment of the complainant.

The Tribunal analysed the provisions of the Privacy Act, particularly those sections which prohibit disclosure of personal information except with the consent of the data subject, that such disclosure was relevant to the purpose of information collection or is necessary for the protection or safety of the data subject or another person.
(s18). Section 19, *inter alia*, prohibits disclosure unless it is directly related to the purpose of collection and the agency has no reason to believe the data subject would object, or the data subject is reasonably likely to be aware or been made aware that the information is usually disclosed to another person or body.

**Findings**

The Tribunal accepted KD’s evidence of the detrimental affect on her when learning that Dr A had been provided with material she had forwarded to the Board. The shock and distress she suffered as a result of the disclosure exacerbated the chronic pain and associated psychological conditions that were present at the time of the procedure. The Tribunal was dismissive of the Board’s argument that the medical history was not confidential information for the purposes of the Privacy Act because at least parts of it were known or likely to have been made known to Dr A. The Tribunal held that the material referred to the doctor for comment was ‘self-evidently “personal information”’ whether or not others have the same information. In accordance with the definition of ‘personal information’ (*supra*), a public sector agency, in this case the Board is obliged to treat such information in accordance with the principles and provisions of the Privacy Act.

A further argument tendered by the Board was that the information sent by KD was not ‘collected’ by the Board as it was unsolicited; therefore, the Privacy Act did not apply. The Tribunal upheld the argument in part by agreeing that the primary materials were not ‘collected’, and therefore some particular sections of the Act did not apply. However, the Tribunal considered that sections 18 and 19 were relevant because they were applicable to ‘collected information’. The Tribunal concluded that the Board were in breach of sections 19(1) and 18(1) (b) of the *Privacy Act*.

According to the Tribunal:

> While the Board has statutory and common law obligations requiring it to provide information to a practitioner the subject of investigation, it does not follow that it is required to disclose all information obtained in the course of that investigation. The rules of procedural fairness and s47 of the Medical Practice Act do not require the Board in effect to act as a mailing house and pass on indiscriminately all information obtained in the course of its inquiry to the subject practitioner. The Board may and, in my view, must, examine the material to determine whether it is ‘credible, relevant and significant or provided on a confidential basis’ (See Brennan J in *Kioa v West* (1985) 159 CLR 550 at 629).

The Tribunal acknowledged the obligation of the Board to provide Dr A with the substance of KD’s claim. As such, it was appropriate for the Board to disclose to Dr A the letter from KD to the Minister. With respect to the Medicare claims history, the Tribunal was of the opinion that only parts of the history were relevant to KD’s complaint and the Board should have given consideration as to whether the whole report should have been so forwarded. The Tribunal opined that it was not persuaded that a later letter by the complainant, which substantially repeated the allegations contained in the complainant’s letter to the Minister and which detailed the emotional and financial costs to KD as a result, needed to be sent to comply with the Board’s statutory and common law obligations.

The Tribunal considered it was reasonable for the Board to assume KD had implied her consent to disclose her complaint to Dr A, but that it was not reasonable to assume that she consented to each and every document being disclosed by the
Board. As to whether KD would have been aware that the information contained in her complaint is usually disclosed to the subject of the complaint, it was not reasonably likely she was aware her Medicare records and her letter of 6 January would have been disclosed to the doctor. Nor was the Board exempt from the privacy protection principles if any of its investigative functions, or its conduct of lawful investigations, might be detrimentally affected by compliance to the principles. The Tribunal was not persuaded there was any basis to conclude that non disclosure of the Medicare history and the respondent’s letter of January might detrimentally affect any of the Board’s investigative functions or its investigation into the complaint against Dr A.

**Conclusion**

An analysis of the above case raises a note of caution regarding the use of confidential personal information in investigating complaints against health professionals. While it might seem axiomatic that a professional against whom a complaint has been made should be given access to all information, collected or unsolicited, in order to allow them to be fully cognisant of the extent of the complaint against them, it is clear that the investigating body has an obligation to maintain client confidentiality to the extent that the information it has in its possession, for the purposes of the investigation, is not relevant to the complaint in question. Thus a decision must be made to exclude, as far as possible, any information that is not necessary for the complaint process.

The NSW Medical Board has initiated a number of reforms of its conduct of investigations as a result of this case. If there are complaints in future that the Board wrongfully exercised its discretion to not disclose particular information to a person against whom a complaint has been made, then that would be a matter for a future judicial body to determine on a case by case basis.

The applicant was sent a written apology from the Board. The applicant in this case did not receive any compensation as her claim related to conduct occurring in 2001. It was not until after 1 July 2002, that an order for compensation could be made. The Tribunal determined not to take any action against the Board in the matter.

This report provides a brief overview of the issues raised in the case. To be fully aware of the issues, the writer recommends that readers obtain a copy of the case and read the text in full.

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