# Health Legal Report – July 2015

## Welcome to the July 2015 edition of the Health Legal Report.

In this issue of the Health Legal Report we discuss:

- Drug Testing in the Workplace;
- Privacy Act – Australian Privacy Principles;
- Mandatory Notification by Registered Practitioners.

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# Drug Testing in the Workplace

By Alon Januszewicz, Senior Associate

Some workplaces will have a drug testing policy as a means of managing the risk of a drug affected employee causing harm to the employer or clients of the employer. The harm suffered by the employer as a result of an employee's drug use could be due to a safety related incident or harm to the reputation of the employer.

Drug testing policies have been commonplace in certain industries for some time (such as the mining sector), however, increasingly our clients are also concerned about introducing drug testing policies. Generally, the drug testing policy will refer to testing in 2 situations:

- 'for cause' (i.e. on suspicion), and
- random testing.

There are some legal risks involved in introducing and enforcing these policies, especially if the employer decides to dismiss an employee who returns a positive result or refuses to undergo a test. In this article we address some issues which commonly arise in relation to drug testing of employees.

## How to test?

There are 2 methods of drug testing which are commonly used by employers: saliva and urine testing. The significance for employees and employers is that a urine test could detect recreational drug use several days prior to the test, whereas the saliva test may not. Consequently, even though the employee is not under the influence of the drug when they submit to the test, a positive result may be returned.

The method of drug testing has been challenged in several cases brought before the Fair Work Commission.

## Is it a reasonable direction to require an employee to submit to a drug test?

Although employees are required to abide by the lawful and reasonable directions of an employer; whether it is reasonable to require an employee to submit to a drug test will depend on the circumstances of each case. Based on recent decisions of the Fair Work Commission, it appears that a direction that the employee submit to a drug test could be a lawful and reasonable direction. Generally, it is more likely that this type of direction will be considered reasonable if the employees have expressly agreed to comply with that direction (i.e. in their employment contract) or if they are made aware of those requirements in advance (i.e. in the employer's policies).

## What can the employer do if the test returns a positive result?

It is important that employers consider each case according to its own circumstances and the drug testing policy should permit this. For example, the consequences of a positive result for a surgeon may not be same as those for a clerical staff member.

In *Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249 the Full Bench of the Fair Work Commission found that the employee was not unfairly dismissed upon the return of a positive drug test (for marijuana). Mr Toms worked as a master of a ferry on Sydney harbour and was involved in an accident. There was no evidence that he was impaired by drug consumption at the time of the accident. The Commission stated that:

> *The lack of any impairment arising from drug use, the absence of a link between drug use and the accident and the absence of substantial damage to the Marjorie Jackson are not factors relevant to the ground of misconduct identified as non-compliance with the Policy. The fact is that Harbour City required its policy complied with without discussion or variation. As an employer charged with public safety it does not want to have a discussion following an accident as to whether or not the level of drug use of one of its captains was a factor. It does not want to listen to the uninformed in the broadcasting or other communications industry talk about drug tests establishing impairment. It does not need to*

> *have a discussion with any relevant insurer, litigant or passenger's legal representative about those issues. What it wants is obedience to the policy. Harbour City never wants to have to have the discussion.*

Similarly, in *Sharp v BCS Infrastructure Support Pty Limited* [2014] FWC 7310 the Commission was satisfied that the employee's positive result for the presence of THC constituted serious misconduct, primarily based on the conduct causing a 'serious and imminent risk to … the reputation, viability or profitability of the employer's business'. The Commission also stressed that each case will depend on its individual circumstances.

## What could happen if you get it wrong?

If an employer decided to dismiss an employee who either failed or refused to submit to a drug test, the employee may bring an unfair dismissal application (providing the employee is 'protected from unfair dismissal'). The Fair Work Commission has powers to make orders to re-instate the employee or to compensate the employee.

The *Fair Work Act 2009* (Cth) requires that '[i]n considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the [Fair Work Commission] must take into account:

> … whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); …

Therefore, when defending an unfair dismissal application, employers will need to convince the Commission that there was a valid reason for the dismissal and this will depend on the circumstances of each employee (their position in the organisation, their employment history, the drug testing policy and the drug test result amongst other matters).

It is important to note that in the cases we have referred to the employer's ability to defend its actions was based on a clear drug testing policy.

Finally, employers of registered health practitioners should be aware that they have an obligation to make a mandatory notification to the Australian Health Practitioner Regulation Agency if they reasonably believe that the practitioner has 'practised … while intoxicated by alcohol or drugs'.

Health Legal has developed a drug testing policy for the health, welfare and community services sector which deals with the key legal requirements involved in random and selective drug testing of employees. We can also advise organisations about managing employees who have returned a positive result or refuse to submit to a test.

*If you have any questions arising out of this article, please contact **Alon Januszewicz** on **(03) 9865 1312**.*

## New Compliance Alert Service

In response to client demand we have developed a new compliance alert service which complements our existing legislative compliance products and services.

Updates to the Compliance Register and Self-Assessment Questions are delivered on a quarterly in arrears basis so that you are updated on legislative changes which have occurred in previous 3 month period.

We have now launched an alert service which provides you with pro-active advanced warning of the commencement of new significant Acts and Regulations. "Significant" Acts and Regulations means those which will have a significant operational impact on your organisation. As part of this alert, we will provide you with a summary of the legislation and provide you with a link to the relevant Act/Regulation.

This alert service will allow you to prepare for new legislation before the Acts and Regulations have commenced.

LAW COMPLIANCE

If you would like to add this service to your current subscription (or if you have any questions), please contact ***Teresa Pollock*** *on* ***(03) 9865 1337*** *or* ***teresa.pollock@lawcompliance.com.au***.

# Privacy Act – Australian Privacy Principles

## *'EZ' and 'EY'* [2015] AICmr 23

By Giovanni Marino, Senior Solicitor

## Introduction

The Australian Privacy Commissioner (**Commissioner**) recently found that a doctor who supplied a patient's personal information to a police officer breached the *Privacy Act 1988* (Cth).

## Background

The complainant (**Mr Z**) was a patient of Dr Y, a medical practitioner who works in a medical centre.

During November 2006, Mr Z contacted the police to report a neighbourhood dispute. One of the police officers (**Sergeant X**) who subsequently attended Mr Z's address reported that Mr Z explained his concerns in a 'highly excited and at times paranoid fashion', and reported that Mr Z admitted to suffering from 'Post Traumatic Stress Disorder, Anxiety Disorder, [and] severe back and knee pain'.

In December 2006, Sergeant X called Dr Y and asked Dr Y whether Mr Z was 'psychotic'. Dr Y advised that this was 'possible but further assessment was needed'.

Mr Z claimed that he became aware of the discussions between Dr Y and Sergeant X through documents he obtained through a Freedom of Information (**FOI**) request.

On 13 December 2013, Mr Z made a complaint to the Commissioner under section 36 of the *Privacy Act*.

## Alleged breaches of the Privacy Act

Mr Z claimed that Dr Y had interfered with his privacy and breached the National Privacy Principles (**NPPs**) previously found in the *Privacy Act* (as this was the law in effect at the relevant time). The NPPs were replaced by the Australian Privacy Principles (**APPs**) on 12 March 2014.

The relevant NPPs in question were:

- NPP 2.1, which provides, amongst other things, that an organisation must not use or disclose personal information other than for the primary purpose for which it was collected unless a specified exception applies;
- NPP 3.1, which requires organisations to take reasonable steps to make sure personal information it collects, uses or discloses is accurate, complete and up to date; and
- NPP 4.1, which requires organisations to take reasonable steps to protect the personal information they hold from misuse and loss, and from unauthorised access, modification or disclosure.

NPP 2.1, NPP 3.1 and NPP 4.1 have been substantially replicated within current APP 6, APP 10 and APP 11 respectively.

In this case, Mr Z claimed that Dr Y:

- improperly disclosed his personal information which was contained in his medical records (in breach of NPP 2.1);
- disclosed inaccurate personal information about him to Sergeant X (in breach of NPP 3.1); and
- failed to have adequate security safeguards to protect his personal information from improper disclosure (in breach of NPP 4.1).

## Consideration by the Commissioner

### NPP 2.1

Dr Y relied on the exceptions under NPP 2.1(e) in relation to the disclosure of Mr Z's personal information to Sergeant X. NPP 2.1(e) provides that disclosure of personal information is permitted where the organisation 'reasonably believes that the use or disclosure is necessary to lessen or prevent':

- a serious and imminent threat to an individual's life, health or safety; or
- a serious threat to public health or public safety.

Dr Y stated that because the police spoke to her about a neighbourhood dispute, she 'was under the impression that there was a concern of public safety'. Dr Y also claimed that because the police were concerned enough to contact her and ask if Mr Z was psychotic, this suggested to her that 'this was an urgent matter of public, and [Mr Z's] safety, and so a response was appropriate and justified'.

In considering NPP 2.1(e), the Commissioner referred to the *Guidelines on Privacy in the Health Sector* (**Health Sector Guidelines**) published by the Office of the Commissioner. The Health Sector Guidelines provide that a threat is 'imminent' if it is about to occur, and a 'serious' threat must reflect 'significant danger', including a potentially life threatening situation, one that might reasonably result in other serious injury or illness, or an emergency when an individual's life or health would be in danger without timely decision and action.

The Health Sector Guidelines also state that the exception relating to serious threats to public health and safety apply to broader safety concerns affecting a number of people.

The Commissioner accepted that Dr Y made her disclosure to Sergeant X in 'good faith to a law enforcement officer', and that Sergeant X was a person who could be regarded as a person who could prevent or lessen a serious or imminent threat.

However, the Commissioner noted that:

- Dr Y had been treating Mr Z for 2 years prior to the event and had seen him on no less than 26 occasions, but she was not 'up to date' with Mr Z's personal situation at the time of the phone contact;
- Dr Y subsequently reported to the police in 2010 that Mr Z 'is not and has never been psychotic'; and
- Dr Y was unable to recall or suggest any specific threat that Mr Z posed to himself or the public, nor did she make any enquiries of Sergeant X regarding the circumstances that led to the phone contact.

Accordingly, the Commissioner was not satisfied that Dr Y could have formed a reasonable belief that Mr Z posed a serious and imminent threat to himself or to the public at the relevant time, and she could not rely on the exception in NPP 2.1(e).

Dr Y also argued that because Sergeant X (a police officer) had requested the information, she assumed that he had authority to do so, and assumed that the matter was of importance, otherwise Sergeant X would not have taken any steps to contact her.

On that basis, Dr Y also relied on exceptions including:

- NPP 2.1(f), which permits disclosure of personal information where an organisation has reason to suspect that unlawful activity is being engaged in, and relevantly discloses the personal information in reporting its concerns to relevant persons or authorities; and
- NPP 2.1 (g), which permits disclosure where 'the use or disclosure is required or authorised by or under law'.

The Commissioner found that these exceptions were also not applicable, for reasons including:

- there was insufficient evidence to support the fact that Dr Y had reason to suspect unlawful activity, and the information before the Commissioner indicated that the phone conversation with Sergeant X was not part of an investigation into unlawful activity; and

- while the Health Sector Guidelines stated that disclosure must occur where there is a warrant or law requiring the health service provider to do so, there was no evidence of such a warrant or law in this case.

As no relevant exceptions applied, the Commissioner found that Dr Y had breached NPP 2.1.

### NPP 3.1

Mr Z alleged that Dr Y stated to Sergeant X that he had a 'history of psychosis' or is a 'psychotic', which was inaccurate and in breach of NPP 3.1.

Dr Y claimed that when Sergeant X questioned whether Mr Z was psychotic, she said this was 'possible but further assessment was needed'.

The Commissioner also noted that there were no entries in Mr Z's medical records indicating that he was psychotic.

The Commissioner found that while it may have been a reasonable step for Dr Y to refer to the medical records before responding to Sergeant X's enquiries, the Commissioner did not think that Dr Y had disclosed inaccurate information to the police, and based her response on her professional assessment of the situation at the time.

The Commissioner found that while Dr Y's comments to the police have caused significant distress to Mr Z, they did not constitute a breach of NPP 3.1.

### NPP 4.1

In relation to NPP 4.1, Mr Z alleged that Dr Y failed to take reasonable steps to protect his personal information because she failed to follow protocols required of her as a general practitioner before disclosing his information to the police.

The Commissioner considered that the 'reasonable steps' that should have been taken by Dr Y in this case included:

- questioning Sergeant X about the reason for the phone contact regarding Mr Z, including ascertaining if there was a warrant or law which authorised disclosure of the information;
- ascertaining if the circumstances constituted a serious and imminent threat to the person or the public; and
- consideration of the various policies, guidelines and obligations in law that apply to the disclosure of personal health information.

The Commissioner found that there was no evidence suggesting that Dr Y questioned the reasons for the police seeking her views on Mr Z. The Commissioner also stated that:

> *'[I]t is my view that insufficient consideration was given to the obligations imposed on health providers to protect an individual's health information, and the need for rigour in considering when it was permitted to disclose that information as articulated in various policies, guidelines. I believe that such steps are a necessary part of securing personal information from unauthorised disclosure.'*

The Commissioner noted Dr Y's advice that she was now mindful of the obligations imposed by the Australian Health Practitioner Regulation Agency (**AHPRA**), the Royal Australian College of General Practitioners' (**RACGP**) and the *Privacy Act* (in relation to securing personal information from unauthorised disclosure). However, the Commissioner found that at the time of the event reasonable steps were not taken to protect Mr Z's health information, and this was in breach of NPP 4.1

## Determination of the Commissioner

On the basis of the above, the Commissioner found that Dr Y had breached NPP 2.1 and 4.1 by disclosing the personal information of Mr Z to the police. The Commissioner ordered that Dr Y apologise in writing to Mr Z, and also pay Mr Z $6,500 compensation for the injury suffered to his feelings and the distress caused by the interference with his privacy.

## Compliance Impact

This case highlights the importance of organisations having clear privacy policies and procedures in place to ensure that personal information is only disclosed in circumstances permitted under the APPs, such as where there is a warrant or applicable law authorising such disclosure, or where there is a reasonable belief that disclosure is necessary to lessen or prevent a serious threat to an individual's life, health or safety, or to public health or safety (note that unlike the NPPs previously in force, the APPs do not require that the threat be 'imminent').

*If you have any questions arising out of this article, please contact **Giovanni Marino** on **(03) 9865 1339**.*

## Precedents/Standard Form Agreements and Policies

Due to client demand, we have developed a range of standard form Agreements and Policies which are commonly used by health, aged care and community service providers. The documents have been prepared in a template form so they can be completed by your staff and include service contracts for the provision of pathology and radiology services, requests for tenders, leases and supply of goods contracts.

Precedents recently added to our range include a software development contract, software licence and support services agreement, material transfer agreements, sponsorship agreement and a short form Request for Proposal.

*For further information about these precedents please contact **Natalie Franks** on **(03) 9865 1324** or **natalie.franks@healthlegal.com.au**.*

# Mandatory Notification by Registered Practitioners

## *The Medical Board of Australia v Al-Naser* [2015] ACAT 15

By Christopher Sykes, Senior Associate

### Introduction

This case concerns the disciplinary action taken by the Medical Board of Australia (**Applicant**) against medical practitioner (**Respondent**) after the Respondent became aware of a sexual relationship between a patient and another medical practitioner who worked at a practice owned and operated by the Respondent.

### Facts

The Respondent, a general practitioner, owns and manages several medical practices.

Between February 2012 and October 2012 the Respondent engaged Dr Maged Khalil (another general practitioner) to work at one of the Respondent's practices.

Between 24 February 2012 and 29 October 2012, Dr Khalil had a sexual relationship with one of his patients at the practice. The patient was being treated for anxiety, insomnia and depression.

On 29 October 2012, the patient requested a consultation with the Respondent. There were 5 subsequent consultations between the patient and the Respondent including a final consultation on 25 March 2013.

Each session with the patient and the Respondent focussed on the patient's relationship with Dr Khalil and the effect of that relationship on her health.

In the course of treating the patient, the Respondent made physical contact with the patient and also made comments about her youthfulness, her looks and her similarity to the Respondent's former girlfriend. The Respondent stated that he made these comments because he "…thought they reflected the context of counselling consultations…".

At the final consultation on 25 March 2013, the Respondent prepared a mental health plan for the Patient and referred the patient to a clinical psychologist for treatment.

At no stage did the Respondent report Dr Khalil to the Applicant or the Australian Practitioner Regulation Agency (**AHPRA**) after learning of the sexual relationship with the patient.

Ultimately, the clinical psychologist to whom the patient was referred and the patient herself notified the Applicant of the relationship.

The Applicant brought disciplinary proceedings against Dr Khalil, who was reprimanded and suspended from practice for nine months. Dr Khalil was also ordered to work with a mentor, consult with a psychologist, and undergo supervision for six months upon returning to work.

Significantly, the Applicant also commenced proceedings against the Respondent for his conduct in dealing with the patient.

## Tribunal's findings

### Failure to notify

The Respondent accepted that he was in breach of section 141 of the *National Health Practitioner Regulation Law* (**National Law**).

Section 141 of the National Law creates a mandatory reporting regime for "notifiable conduct" by requiring (subject to very limited exemptions) health practitioners to notify AHPRA as soon as practicable after forming the reasonable belief that another practitioner has behaved in a way that constitutes notifiable conduct.

Under the National Law, "notifiable conduct" means the practitioner has:

(a) practised the practitioner's profession while intoxicated by alcohol or drugs; or

(b) engaged in sexual misconduct in connection with the practice of the practitioner's profession; or

(c) placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or

(d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

Although a breach of section 141 is not an offence, a breach of section 141 can give rise to disciplinary action by the relevant registration board – as occurred in this case.

### Other findings of misconduct

The Tribunal also found that the Respondent acted inappropriately by engaging in physical contact with the Patient and in making comments of a personal nature.

The Tribunal considered the Respondent's actions to be "inappropriate, particularly in circumstances where the patient was a victim of a sexual misconduct boundary violation".

## Consent Orders

By consent, the Respondent agreed that he:

- Be reprimanded;
- Attend and successfully complete professional development courses;

- Meet monthly with a mentor (for 12 months) to discuss any issues of clinical practice, medical ethics and cultural awareness; and
- Be banned from having, for a period of two years, any actual or perceived role as a supervisor in any practice that he owns, has an interest in or works in, including;
    1. the professional supervision of employed/contracted medical practitioners;
    2. the review of any complaints made against employed/contracted medical practitioners;
    3. the ethical obligations of employed/contracted medical practitioners; and
    4. the provision of advice, guidance or directions to medical practitioners relating to their professional obligations.

The Tribunal ordered that the suspension and conditions of practice be recorded on AHPRA's public register.

The Respondent was ordered to pay the Applicant's costs on a Supreme Court scale.

### Compliance Impact

This decision demonstrates how a registration board dealt with a practitioner who did not comply with the mandatory reporting requirements under the National Law.

Although it was not raised in this case (which only considered the personal professional obligations of a registered practitioner), employers of registered practitioners must also be aware of their mandatory reporting obligations under section 142 of the National Law. This obligation arises if the employer reasonably believes an employee health practitioner has behaved in a way that constitutes notifiable conduct. An employer can be a body corporate or they could be an individual. The employer does not need to a registered practitioner for section 142 to apply.

If AHPRA becomes aware that an employer is in breach of section 142, AHPRA must give a written report about the failure to the responsible Minister for the participating jurisdiction in which the notifiable conduct occurred. The matter can then be referred to a relevant regulatory body such as the Health Care Complaints Commission in NSW or the Health Services Commissioner in Victoria who may then take action against the employer.

From a compliance perspective, organisations should have appropriate policies in place to ensure staff are aware of their mandatory reporting obligations.

*If you have any questions arising out of this article, please contact **Christopher Sykes** on **(03) 9865 1329**.*

## Staff Profile

### Alon Januszewicz, Senior Associate

Prior to joining Health Legal, Alon was Senior Legal Adviser to the Australian Health Practitioner Regulation Agency. He has previous experience as a senior legal officer in the Attorney-General's Department and as a Research Associate to the Federal Court of Australia.

Alon has a Masters degree in Law and is also a member of the New York Bar having passed the New York Bar exam.

Alon's commercial experience includes drafting and providing advice about IT contracts, tendering and procurement agreements and government funding agreements.

Alon has extensive experience providing HR and industrial advice and assisting

employers handle industrial and employee matters. Alon's experience also extends to advising about governance, including matters related to managing conflict of interest and making decisions within delegated authority.

***Alon Januszewicz** can be contacted on **(03) 9865 1339** or **alon.januszewicz@healthlegal.com.au**.*

## Legislative Compliance

Our legislative compliance services continue to expand. We have developed a legislative compliance solution which specifically meets the needs of public and private health care organisations, aged care providers, Government authorities, community health centres, community service and welfare organisations and early childhood service providers throughout Australia.

More than 230 organisations now subscribe to our compliance services which consist of:

- a legislative compliance register (including reporting format and guidelines)
- quarterly legislative updates
- compliance alerts
- training brochures and FAQ hotline
- self-assessment questions (with quarterly updates)
- external review and reporting
- case law updates
- face to face training

Subscribers are able to select all or any of the above services.

The case law update reflects the requirements of NSQHS Standard 1.1.1 which requires as a key task that organisations be kept regularly and reliably updated on relevant case law. Each quarter we summarise the key cases which have considered the legislation which impacts on our subscribers, as well as other areas of risk.

In addition to the areas covered by the legislative compliance register, the case law update covers new case law throughout Australia in relation to:

- consent and informed decision-making
- medical negligence
- contracts
- clinical and corporate governance.

LAW COMPLIANCE

*For further information, please contact **Teresa Pollock** on **(03) 9865 1337** or **teresa.pollock@lawcompliance.com.au**.*

## Best Lawyers

Health Legal's team members are acknowledged legal leaders with Legal Counsels' Natalie Franks and Claudia Hirst both being recently selected for inclusion in the *Best Lawyers*® list for Australia.



## Contact us

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