

# HOLMAN WEBB LAWYERS LEGAL ISSUES

ACS State Conference 2014  
People, Power & Purpose



 **Holman Webb**  
Lawyers

# Health Records and Privacy Update

## Presented by:

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Lawyers

# Australian Privacy

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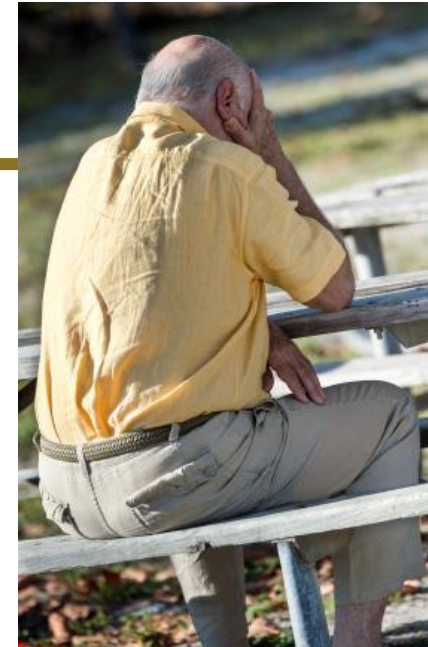
## Why is privacy important?

- Health information is more than just data and statistics – if often reflects a person's:
  - Medical condition (including HIV status)
  - Mental health
  - Lifestyle
  - Sexual preference
  - Personal history (in terms of sexual or other abuse)
  - Family history
  - Beliefs

*You are a custodian of a person's secrets*

*Misuse of health information has led to patient suicide....*

*We need to be culturally sensitive to health information, for example, in relation to indigenous health*



# Australian privacy key concepts

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## What's new for health care providers in 2014?

- Increased penalties
- Increased powers of the Australian Information Commissioner
- More uniformity across States regarding health information – some provisions previously contained in individual State health privacy legislation will now operate in the private sector nationally and for Commonwealth agencies such as DOH and Medicare



# Australian Privacy

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Australian privacy laws  
(as they relate to health information)  
include:

- *Privacy Act 1988 (Commonwealth)* – Commonwealth agencies and private sector
- *Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)*
  - will increase penalties to AUD\$340K for individuals and AUD\$1.7 million for some offences for body corporates from **12 March 2014**
  - *Useful resources: fact sheets and guidelines on <http://www.oaic.gov.au>*
- *Health Records and Information Privacy Act 2002 (NSW)*
- *Health Records Act 2001 (Vic)*
- *Health Records (Privacy and Access) Act 1997 (ACT)*

# Australian Privacy

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## To whom does the Commonwealth legislation apply?

- Commonwealth government agencies and private sector
- Whilst there are is a small business operator exemption (annual turnover of \$3 million or less for a financial year) – this does *not* apply to health information
- The APPs extend to an act done or practice engaged in and outside Australia by an organisation that has an “Australian link”
  - Australian company
  - Someone who carries on business in Australia
  - Information is collected or held in Australia
  - Websites which offers goods and services in Australia
  - Australia is a country in a drop down menu on the entity’s website



State laws apply to State government agencies

# Australian Privacy

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## Special rules for health records

- Health information is “sensitive information”
- Use and disclosure is permitted if there is a serious and imminent threat to the health and safety of an individual or the public
- Use and disclosure for health and medical research if certain conditions are met eg NHMRC guidelines
- Disclosures to carers for compassionate reasons
- Restrictions on access if providing direct access would pose a serious threat to the life or health of any individual
- Use and disclosure of genetic information to lessen or prevent a serious threat to a genetic relative
- The collection of family, social and medical histories is permitted in some circumstances – Public Interest Determination No 12A

# Australian Privacy

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## **“Permitted health situations”**

- Information is necessary for the provision of a health to the information; and
  - required or authorized by Australian Law; or
  - Collection is in accordance with the rules established by a competent health or medical body that deals with professional confidentiality that binds the organization
- Research relevant to public health or public safety or the management, funding or monitoring of a health services and certain conditions are met;
- Compilation or analyzing statistics relevant to public health and safety and certain conditions are met;
- Necessary to prevent a serious threat to the life, health or safety of a genetic relative and certain conditions are met



# Australian privacy key concepts

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## “Permitted health situations”

- Disclosure to a responsible person for an individual
  - Where the organisation discloses health information about an individual and
    - The organisation provides a health service to the individual; and
    - The recipient of the information is a responsible person for the individual; and
    - The individual is either physically or legally incapable of giving consent to the disclosure, or physically cannot communicate consent to the disclosure; and
    - Another individual providing the health service (carer) is satisfied that the disclosure is necessary to provide appropriate care or treatment of the individual, or the disclosure is made for compassionate reasons; and
    - The disclosure is not contrary to any wish expressed by the individual before the individual became unable to give or communicate consent of which the carer is aware or of which the carer could reasonably be expected to be aware; and
    - The disclosure is limited to the extent reasonable and necessary to provide appropriate care and treatment of the individual or to fulfil the purpose of making a disclosure for compassionate reasons

# Australian privacy key concepts

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**“personal information”** means

*“information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion “*



# Australian privacy key concepts

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**“health information”** means:

(a) *information or an opinion about:*

*the health or disability (at any time) of an individual; or*

*(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 part, organs or body substances; or*

(d) *genetic information about an individual in a form that is, or could be, predictive of the health of the individual or a genetic relative of the individual*

# Australian privacy key concepts

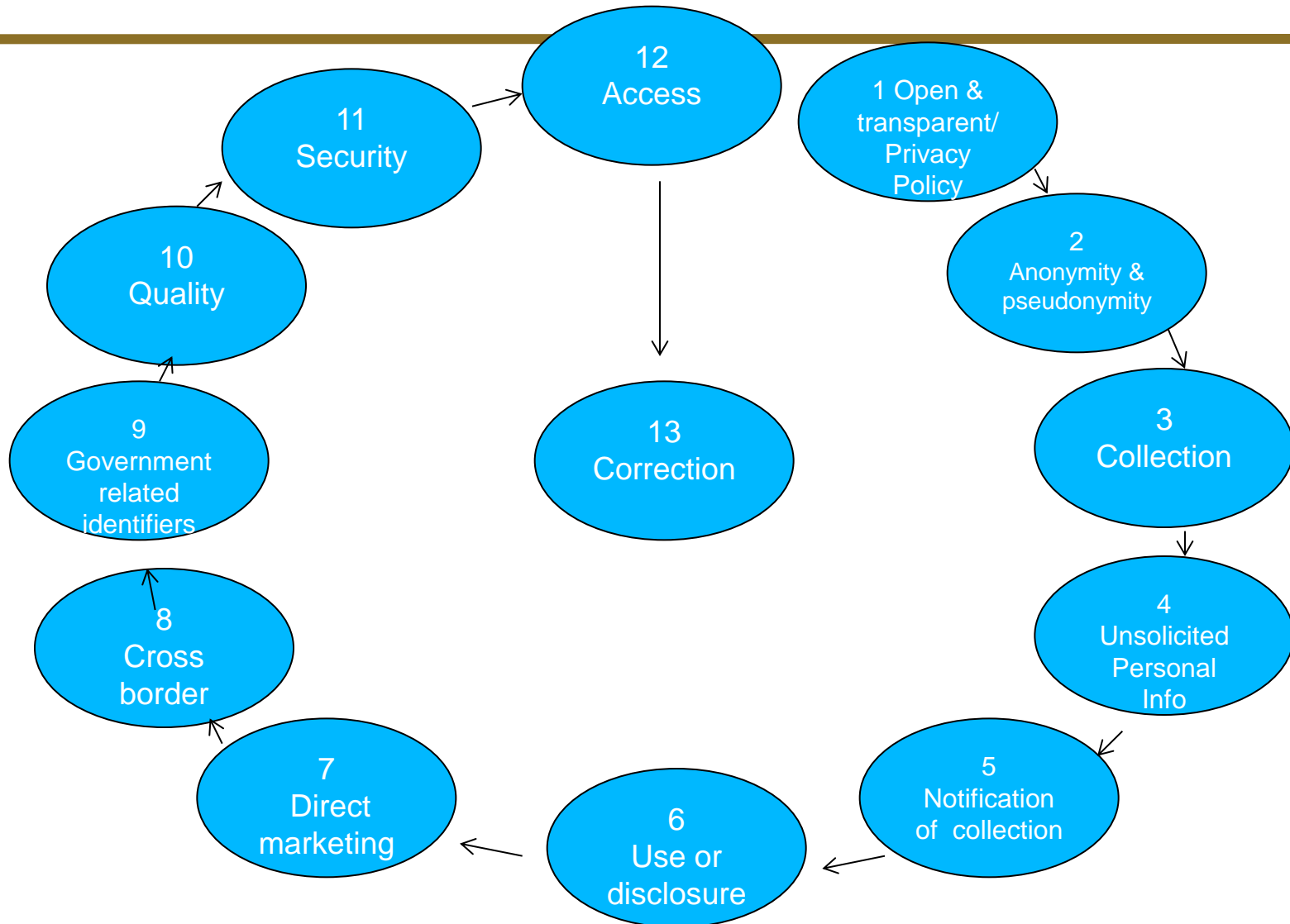
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**“health service”** means:

- (a) an activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the person performing it:
  - (i) to access, record, maintain or improve the individual’s health; or*
  - (ii) to diagnose the individual’s illness or disability; or*
  - (iii) to treat the individual’s illness or disability or suspected illness or disability; or**
- (b) the dispensing on prescription of a drug or medical preparation by a pharmacist*



# Australian Privacy Principles



# Australian privacy key concepts

## Australian Privacy Principles

- **APP 8 – Cross-border disclosure of personal information**
  - Before an organisation discloses personal information to an overseas recipient, the entity must take reasonable steps to ensure that the overseas recipient does not breach the APPs in relation to the information
  - An entity that discloses personal information to an overseas recipient is accountable for any acts or practices of the overseas recipient in relation to the information that would breach the APPs



# Quick privacy checklist

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1. What personal information do you collect?
2. Who is it collected from?
3. How is it collected?
4. How do you use that personal information?
5. To whom do you disclose that personal information?
6. What about third party contractors  
e.g. IT and web services?
7. Do you send information overseas?
8. Do you collect information  
from overseas?
9. What about your website?



# Quick privacy checklist

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Do you have a:

- Privacy Officer?
- Privacy Policy?
- Privacy Manual?
- Have you updated it to take into consideration the amended laws?



Do you engage in direct marketing for fundraising etc.?

Do you engage in research?

Do your employees know their privacy obligations?

Are process in place to deal with breaches of privacy?



# More info?

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More information?

Australian Privacy Principles Guidelines

<http://www.oaic.gov.au/privacy/privacy-act/privacy-law-reform>

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*This presentation is for general information only and should not be relied upon as legal advice.*



# SOCIAL MEDIA



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Lawyers

# THE POSITIVES

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## □ The positives

- You can monitor your brand
- You can disseminate information quickly
- You can distribute inspirational stories
- You can use it as a educational or promotional platform
- You can use it to create an alumni of happy families/residents/staff (user communities)



# THE GENERAL RISK

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- Violation of your legal, professional, social or ethical obligations via social media is no different to violation of those obligations in any other way
- You must monitor and control social media in the same way you monitor and control all other conduct
- The conduct of your staff may expose you to risk – and certainly embarrassment



# LEGAL ISSUES

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- Harassment/Bullying and discrimination
- Confidentiality/privacy
- Employment/dismissal/pre-employment check
- Misleading and deceptive conduct
- Copyright/trademark infringement
- Creating binding contracts
- Defamation
- Evidence
- Criminal conduct
- NFP Funding



# USE OF SOCIAL MEDIA BY STAFF

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## □ Consider and Communicate:

- What online presence is acceptable
- Email use protocols – should private emails on work related matters be accessible to the employer?
- What sites (or types of sites) will be blocked
- Train and educate
- Confirm that you will take into account *all* social media interaction
- The consequences of misuse



# THINGS YOU MUST HAVE IN PLACE

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- Ensure you have a written:
  - Online/Social media strategy (purposeful and directed)
  - Usage and compliance guidelines for internal users
  - Terms and conditions for website, blogs and external users (including disclaimers)
  - Strong and enforceable privacy rules and processes



# **Workplace Relations Update - Bullying**

**ACS State Conference 14-15 May 2014**

**Rachael Sutton, Partner**

**Alicia Mataere, Senior Associate**





# What's the framework?

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## □ Fair Work Act 2013

- Commenced 1 January 2014
- Applies to workers as defined by relevant WHS laws and constitutionally covered businesses
- Application may be made to FWC
- Applications dealt with within 14 days
- Stop bullying orders may be made
- Contravention penalties

# What is bullying?

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- Defined –
  - “repeated unreasonable behaviour by an individual, or group of individuals, towards the worker, or a group of workers of whom the worker is a member, which creates a risk to health and safety”
  - Not reasonable management actions carried out in a reasonable manner

# Stop bullying orders

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- FWC may make appropriate orders to prevent bullying but not pecuniary orders
- FWC must take into account –
  - Outcomes from any investigation
  - Relevant grievance dispute procedures & outcomes
  - Other matters FWC considers relevant.

# Decisions

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- Application dismissed - unpaid filing fee & request for more information not provided
- Order to stop bullying made by consent, following a conference with SDP Drake
- Carer receiving benefits not a worker
- Behaviour pre 1 January 2014 will be considered
- First substantive Decision – “reasonable management action”

# Practical Tips

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- Review, update, implement & comply with policies and grievance procedures
- Reports and complaints must be taken seriously and properly, fairly and objectively investigated
- Guides on workplace bullying
- Heightened areas of concern

# Common workplace risk factors...

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## Organisational Change

- Technological change
- Restructure, redundancy
- outsourcing

## Negative leadership styles

- Autocratic leadership (strict and directive)
- Unstructured leadership style

## Lack of appropriate work systems

- Lack of resources, training and role definition
- Unreasonable timeframes and hours

## Poor workplace relationships

- Criticism and other negative interactions
- Interpersonal conflict

## Vulnerable workers

- Young, new, apprentices, older workers, minorities, NESB