Australian Government Attorney-General’s Department
Submission to the Review of Privacy Act 1988 Discussion Paper
January 2022

Improve the Mental Health of Communities
Introduction

About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises governments on mental health care. The RANZCP is the peak body representing psychiatrists in Australia and New Zealand and as a bi-national college has strong ties with associations in the Asia-Pacific region.

The RANZCP has over 7400 members, including more than 5400 qualified psychiatrists and almost 2000 members who are training to qualify as psychiatrists.

Background

On 25 October 2021, the Australian Government’s Attorney General’s Department (AGD) released the next component of their review of privacy protections under the Privacy Act 1988 (the Act), a discussion paper. The RANZCP has previously provided two submissions on privacy protections in response to the release of the Online Privacy Bill, another component of the Government’s review - one relating to a potential Children’s Data Code to protect the private information of children, as part of a coalition of organisations including Reset Australia, Orygen, InsideOut, ReachOut, and SANE Australia. The other as a stand-alone submission regarding the impact of the proposed Online Privacy Bill on other at-risk groups.

The RANZCP has also previously contributed to requests from the AGD on the issue of privacy protections as they relate to health information and vulnerable groups. These included a submission to the Australian Law Review Commission’s inquiry - Family Law for the Future: An Inquiry into the Family Law System.

The RANZCP’s position on privacy protections as they can apply to at-risk groups and the importance of the confidential nature of the consumer-practitioner relationship, particularly to those most vulnerable, are also outlined in the Position Statement 89 - Patient–psychiatrist confidentiality: the issue of subpoenas, Position Statement 83 - Recognising and addressing the mental health needs of the LGBTIQ+ population, and Professional Practice Guideline 3 – Australian Family Court Proceedings. The responses below reflect these established statements and guidelines.

Issues

The RANZCP submission focuses on the issues in the discussion paper which directly impact psychiatric practice notably the:

- definition of personal information and sensitive information (health information being a subset of sensitive information)
- consent
- implications of different privacy laws across federal, state and territory jurisdictions.
1. **Defining ‘personal information’ (including sensitive information)** (pages 16-35 refers)

The RANZCP, as stated previously, asserts the importance of the confidentiality of the patient-practitioner relationship. It is foundational to the provision of appropriate psychiatric services and meeting the needs of patients for recovery.

As previously noted by the RANZCP, there is a continued tension between that information that is captured by the health record and the framework which guides privacy restrictions under the Act.

The RANZCP would suggest that, in respect to the inclusion of any information as ‘personal information’, consideration be given to whether the information is true and correct. The classifying of information as ‘personal information’ ‘whether true or not’, for the purpose of privacy protections, could potentially lead to the abuse of information for vexatious purposes or the misrepresentation of incorrect information as ‘evidence’ or ‘fact’ resulting in wrong diagnosis for example. There needs to be appropriate avenues to have incorrect or outdated information removed, so as to not cause issues for the patient into the future such as with being gainfully employed and acquiring health insurance, which again, can have an impact on a patient’s recovery.

Ideally, the RANZCP would suggest, that legislation should be drafted in a way that protects all those it seeks to cover without necessarily identifying specific groups (except for those identified as lacking capacity under other legislation) but include consideration as to the handling of the disclosure of information involving those most at-risk. For example in the case of persons suffering from trauma including the subject of sexual abuse or PSTD, the person involved should be able to control what information is given, and to which professional.

The RANZCP would also welcome further engagement on the exemptions allowed for in the Act. The RANZCP notes that the paper could have addressed the challenges to psychiatrists, as noted in previous submissions by the RANZCP, posed by broader public interest exceptions. For example, in the instance of clinicians having to provide information as part of legal proceedings particularly in the context of family law or sexual assault cases, and enforcement investigations, or the conflict between the ethical duties of clinicians and the forced disclosure of patient information, by means of subpoenas.

Additionally, the RANZCP has previously highlighted in its 2021 submission to the Online Privacy Bill – Vulnerable Groups, the need for a distinction to be made between information collected and used for clinical purposes versus information used and collected for training use. Information collected for training could be made exempt from the health record altogether, supporting trust between the patient and practitioner, with patients sharing more freely, knowing that what is shared, will not be shared beyond themselves and their analyst, for example in legal proceedings.

2. **Consent** (pages 74-79 refers)

The RANZCP welcomes the Review’s definition of consent to be voluntary, informed, current, specific, and unambiguous.

In view of the proposed use of standardised consents, the RANZCP would highlight that ‘consent’ as a concept, is not always total and inclusive. There are elements to ‘consent’ where within even compromised capacity, there exists scope for patients to make intermediary decisions about day-to-day aspects of their care not directly connected to their treatment.
In this regard, the RANZCP’s position is based on the right of a consumer to the best mental health care, in a manner that respects their humanity and dignity. As much as possible, treatment is to occur in a culturally informed way, including respecting a consumers’ right to privacy and simultaneously, consumers being fully involved in the decisions affecting their lives, including how their ‘health information’ is used or disclosed.

The RANZCP agrees with the proposal in the paper relating to the renewing of consent, perhaps on a yearly basis, to account for changes in a patient’s circumstances. The RANZCP would also recommend that consideration be given to how ‘consent’ or the handling of sensitive information would be reintroduced in the case of some treatment choices resulting in permanent or temporary cognitive decline such as memory loss.


The RANZCP is of the view that harmonious protocols for the treatment of health information, across jurisdictions, is extremely important. This is especially so in these COVID times, where in many cases telehealth has become the primary vehicle for providing psychiatric services. It is also of consequence for anyone who may need to seek mental health care across jurisdictions and their families who may live in other jurisdictions to the person they care about.

Cross-border communications that clarify access processes, rights, and responsibilities, should be a priority for any proposed working group. Patients and practitioners alike would benefit from more certainty (with respect to the handling of their sensitive information) and consistency.

The RANZCP would welcome the opportunity to provide further comment to any report produced by the working group, if established, and/or act as a consultative body.