



# **Examining and Interpreting Exceptions to Privacy and Confidentiality Obligations of School Counsellors – When Can You Share or Disclose?**

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LAW FOR SCHOOL COUNSELLORS AND GUIDANCE OFFICERS QLD -  
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# Outline

## **Understanding your privacy and confidentiality obligations**

- **Who owns your records?**
- **What are the exceptions to confidentiality?**
- **How do I confer with colleagues for advice?**
- **When can I share with College Leadership?**
- **What if a student has committed a crime?**
- **Take Home Observations**



# Obligations of Confidence

## **Contractual obligation of confidentiality**

- Contractual relationship between parents and school
- Terms of a contract
  - In writing;
  - Agreed to orally;
  - Incorporated by conduct or part performance;
  - Implied for business efficacy
- Generally no single “Enrolment Contract”
  - Application for Enrolment
  - Terms of Enrolment
  - Policies (where incorporated) (i.e. Privacy Policy)
- Breach of contract – parties placed in position if contract performed



# Obligations of Confidence

## Equitable Breach of Confidence

- Elements:

- Receive information of a confidential nature – secret in nature
- Received in circumstances of confidence (i.e. Counselling session)
- Recipient held accountable for any misuse that causes detriment to the discloser

- Traditional Remedies:

- Injunction to restrain breach/continued breach
- Compensation for economic loss
- Account of profits derived from the breach
- Damages for emotional distress?

- *Gillet v Procepets (2008) 24 VR 1*

- disclosure of a videotape of intimate activities
- Claimant could recover for consequent emotional distress as equitable compensation



# Obligations of Confidence

## ***Privacy Act 1988***

- Personal Information – information or an opinion about an individual whose identity is apparent or can reasonably be ascertained
- Sensitive Information:
  - Health
  - Racial or ethnic origin
  - Political opinions
  - Religious beliefs/affiliations
  - Philosophical beliefs
  - Sexual orientation/practices
  - Criminal record
- Collection of Sensitive Information – must have consent and be reasonably necessary for functions of organisation



# Obligations of Confidence

## ***Privacy Act 1988***

### •“Use”

- Entity handles and manages the information. Examples include:
  - accessing and reading the personal information
  - searching records for the personal information
  - making a decision based on the personal information
  - passing the personal information from one part of the entity to another
  - unauthorised access by an employee.

### •“Disclosure”

- makes it accessible or visible to others outside the entity and releases the subsequent handling of the personal information from its effective control.

### •Using/Disclosing Sensitive Information

- for the primary purpose which it was collected (the specific purpose for collection; or
- a secondary purpose with consent and where it is directly related to primary purpose)



# Obligations of Confidence

## ***Common Law right to privacy - Grosse v Purvis (Queensland District Court, 2003)***

- Serious allegations of stalking and harassment by the defendant, in circumstances arising from a failed domestic relationship.
- The essential elements would be:
  - a willed act by the defendant,
  - which intrudes upon the privacy or seclusion of the plaintiff,
  - in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,
  - which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.





# Obligations of Confidence

## ***Ethical Obligations***

- For example - *Australian Psychological Society's Code of Ethics*
  - Psychologists must make provisions for maintaining confidentiality in the collection, recording, accessing, storage, dissemination and disposal of information
  - Take reasonable steps to protect confidentiality
  - Only disclose:
    - With consent
    - Where there is a legal obligation
    - Where there is an immediate and specified risk of harm to an identifiable person that can be averted only by disclosing
- Breaches – Disciplinary outcomes



# Who owns my records?

## • ***Breen v Williams (1996) 186 CLR 71***

- Access to medical records by patient
- As between Professional and Client (i.e. Counsellor and Patient), documents prepared by a professional person which assist the professional to perform his/her professional duties are not the property of the client
- The documents remain the property of the Professional
- Professional providing services to Student in a personal capacity – records belong to the Professional
- Professional providing services to Student as a Contractor (to the College) – ownership will depend on the Contractor Agreement (failing clarity – would belong to the Professional)
- Professional providing services as an Employee of the College – Records belong to the College where created in course of employment
- But “Ownership” does not avoid “Use” obligations under the Australian Privacy Principles



# Exceptions to Consent?

## • **Equitable Breach of Confidence – Disclosure in the Public Interest**

- *A v Heydon* (1984) 156 CLR 532
  - Identity of ASIS Agents to Victoria Police
  - Alleged criminal offences committed by Agents
  - Identity of Agents protected from disclosure
  - It was in the public interest to disclose – interests of justice required a proper investigation by authorities
- *W v Egdell* [1990] Ch 359
  - Medical report for a violent prisoner prepared by Psychologist
  - Report released to Hospital Superintendent where prisoner detained
  - Prisoner did not consent to release of report
  - Held to be in the public interest – Protecting persons from harm outweighed the prisoner's interest in report being kept confidential



# Exceptions to Consent?

## •Use/ Disclosure under the Australian Privacy Principles

- Disclosure authorised by law
  - a warrant, order or notice issued by a court
  - a statutory requirement to report certain matters (i.e. Mandatory reporting),
  - a law applying to the entity clearly and specifically authorises it to use or disclose the personal information,
- A Permitted General Situation exists
  - Lessening or preventing a serious threat to life, health or safety
  - Taking appropriate action in relation to suspected unlawful activity or serious misconduct
  - Locating a person reported as missing
- A Permitted Health Situation exists
  - Probably not applicable for Schools
- Using or disclosing personal information for an enforcement related activity
  - Reasonable belief that the use or disclosure is reasonably necessary for an enforcement related activities
  - Enforcement related activities - prevention, detection, investigation and prosecution or punishment of criminal offences and intelligence gathering activities



# Exceptions to Consent?

- **Mandatory/Statutory Reporting Obligations over-ride confidentiality obligations**

- *Education (General Provisions Act) 2006, Chapter 11, Part 10*

- A person who makes a report is not liable, civilly, criminally or under an administrative process, for giving the information contained in the report to someone else.
- In a proceeding for defamation, the person has a defence of absolute privilege for publishing the information
- If the person would otherwise be required to maintain confidentiality about the given information under an Act, oath, rule of law or practice—the person does not contravene the requirement by giving the information.

- *Section 197 – Child Protection Act*

- Where the person is acting reasonably and honestly, the person is not liable, civilly, criminally or under an administrative process, for giving the notification or information.
- Merely because the person gives the notification or information, the person can not be held to have:
  - breached any code of professional etiquette or ethics;
  - departed from accepted standards of professional conduct; and
  - Breached any obligation of confidentiality.
- In a proceeding for defamation, the person has a defence of absolute privilege.



# Exceptions to Consent?

## Transfer Notes

- *Education (General Provisions Act) 2006, sections 384-388*
- Definition – Assessment Results, Behavioural Results, Must be factual, succinct and objective.
- Purpose
  - Ensure the continuity of the students education program, and
  - meet duty of care obligations to the student and the school community
- Relevant Person –
  - Where student is a child: Mother, Father, or person who exercises parental responsibility
  - Can include Indigenous Tradition
  - Where student is an adult – the student
- Request for Transfer Note can be made by Relevant Parent or New Principal
- Process to allow the Relevant Person to obtain a copy of the Transfer Note (and documents)
- Unless it is not appropriate to give to parent (i.e. Student living independently), in which case it must be given to the student
- Principal – protection from civil liability providing he/she acted honestly and without negligence under the Chapter
- Liability attaches to the Governing Body/State of Queensland



# Conferring with Colleagues?

- **APS Code of Ethics – A.5.2(d)**

- When consulting colleagues, or in the course of supervision or professional training, provided the Psychologist:

- Conceals the identity of clients and associated parties involved; or
- Obtains the client's consent, and gives prior notice to the recipients that they are required to preserve privacy, and obtain undertaking from the colleague



# Disclosing to Leadership?

- Disclosure to Principal/Leadership = “Use” under the Privacy Act
- General Rule = “Use” sensitive information for primary purpose of collection, unless individual has consented
- Any other “Use” (disclosure to Principal/Leadership) would need to fit within an exemption, i.e.:
  - Authorised by law (i.e. Mandatory reporting)
  - Lessening or preventing a serious threat to life, health or safety
  - Taking appropriate action in relation to suspected unlawful activity or serious misconduct
  - Locating a person reported as missing





# Student has, or will, commit a criminal offence?

- Other than mandatory reporting, no express obligation to report criminal offending in Qld
  - Contrast with section 316 and 316A of the *Crimes Act 1900* (NSW) – Concealing Serious Indictable Offence/ Concealing Child Abuse Offence
  - Royal Commission Recommendation to remedy this deficiency
- Disclosure in the Public Interest as a defence to breach of equitable confidence (*A v Heydon; W v Edgell*)
- Using or disclosing personal information for an enforcement related activity (Privacy Act)
  - Reasonable belief that the use or disclosure is reasonably necessary for an enforcement related activities



# Take Home Observations

- Never lightly dismiss your obligations of confidence
  - Potential ramifications for the confider, your reputation, the school
- Even when disclosing based on exception, consider the interests of the confider?
  - Should they be consulted with?
  - How can their interests be protected in the process?
- Even when dealing with children, they have the right to be involved in the decision making process (depending on age and intellectual capacity)
- Educate School Leadership regarding your confidentiality obligations
  - Don't simply tell them that you will not share information
  - Instead take them on the journey and reassure them that you will comply with your reporting obligations/duty of care obligations

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