

PRIVACY
NEW SOUTH WALES

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Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of NSW
Macquarie Street
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Dear Mr Collier

I refer to our previous correspondence and to your office's telephone conversations with Ms Rivlin regarding the Review of *Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003* (the "Regulation"). The Legislation Review Committee has requested that Privacy NSW consider the privacy implications of clause 27 of the Regulation. I am pleased to be able to provide you with advice in this matter and apologise for the delay in providing our response.

Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003

According to the Explanatory Note to the Regulation, the object of the Regulation is to make provision for out-of-home care, (previously known as foster care), of young persons and children pursuant to the *Children and Young Persons (Care and Protection) Act 1998*. The Regulation seeks to regulate the conduct of "authorised carers" (being persons authorised to provide out-of-home care). Part 6, Division 2, provides for the authorisation of carers by "designated agencies". Designated agencies include "a department of the Public Service, or an organisation that arranges the provision of out-of-home care".¹ Designated agencies can include government departments such as the Department of Community Services, as well as external service providers and private sector organisations such as private fostering agencies that arrange the provision of out-of-home-care service.²

Under section 140 of the *Children and Young Persons (Care and Protection) Act 1998* (the "CYP Act") the designated agency that places a child or young person in the out-of-home care of an authorised carer is responsible for supervising the

¹ Section 139 of the *Children and Young Persons (Care and Protection) Act 1998*.

² Section 22A of the *Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003*, section 22A provides for interim accreditation of government departments and various other bodies and organisations.

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placement. Section 140(d) places a duty on the agency to ensure that the safety, welfare and well-being of the child or young person is being protected and promoted.

Clause 20 of the Regulation provides that a designated agency may authorise an individual, only if an assessment has been carried out and it is determined that the individual is suitable to be an authorised carer. An individual must furnish such information as the agency may "reasonably require" in order to assess their suitability. In addition, an agency may make such enquires as to the individual, and any person who is aged 14 or over in the household of the individual, as the agency considers appropriate.

Clause 27 of the Regulation provides:

27 Medical examination

An authorised carer must, if requested in writing by the designated agency on the written advice of a medical practitioner:

(a) undergo, or cause a member of the authorised carer's household to undergo, such examination by a medical practitioner as is reasonably necessary to ascertain whether the authorised carer's household is a healthy environment for the care of children or young persons; and

(b) provide a report of such examination to the designated agency and to any other supervising person who requests that the report be provided to it.

Clause 19 defines "supervising person" as the Director General, or an officer or employee, of the designated agency. Clause 27 applies to "authorised" carers, that is those individuals who have already been assessed as suitable under clause 20. It appears that clause 27 would not be employed in the initial assessment process which determines whether an individual will receive authorisation.

The Legislation Review Committee informs me that: "*According to the Department [of Community Services] the purpose of clause 27 is to enable the screening of carers and members of their household for communicable disease*", although this does not appear to be specified in the Regulation. It is not clear whether a designated agency would routinely screen all authorised carers and/or their household members under clause 27 as a matter of course or periodically, or whether clause 27 would be employed only if the designated agency for some reason had cause to believe that an authorised carer's household was not a healthy environment for the care of children or young persons.

The Regulation does not identify what circumstances might cause or prompt a designated agency to seek the advice of a medical practitioner as to whether a medical report should be obtained, and to then make a request to an authorised carer and/or household member that a medical report is obtained. In the absence of any statutory guidance as to when such medical information should be sought, there is clearly a need to balance the requirements of the *Children and Young Persons (Care and Protection) Act 1998*, and the Regulation, for a designated agency to

provide out-of-home-care in a safe and healthy environment, with the need to ensure that the privacy rights of authorised carers, and their household members, are protected and are not subject to undue interference.

Before turning to the operation of the *Privacy and Personal Information Protection Act 1998* in NSW (the PPIP Act), it should be noted by the Legislation Review Committee that while the purpose of Privacy laws in NSW is to ensure that government departments act fairly in the way in which they collect, store, use and disclose personal information, the PPIP Act contains a number of provisions that specifically recognise the overriding obligations of public sector organisations to protect the health and safety of the community in certain circumstances.

The operation of the *Privacy and Personal Information Protection Act 1998* in NSW

The PPIP Act sets out 12 Information Protection Principles (IPPs), which govern the way personal information must be collected, stored, used, accessed and disclosed by public sector agencies.

The PPIP Act also provides redress for individuals who consider that a public sector agency has breached its obligations under the Act, whereby an individual may request that the agency undertakes an Internal Review of the conduct which it is alleged contravenes the PPIP Act. The PPIP Act also provides for a right of review to the Administrative Decisions Tribunal in certain circumstances.

Generally, a designated agency, within the meaning of the Regulation, which is also a public sector agency, such as the Department of Community Services, must comply with PPIP Act and the IPPs unless a particular activity falls within one of the exemptions to the Act.

The IPPs which appear to be of particular relevance in this matter include IPPs 2, 3 and 4 relating to the collection of information (sections 9, 10 and 11 of the PPIP Act), and IPPs 10, 11, and 12 relating to the use and disclosure of information (sections 17, 18 and 19 of the PPIP Act).

Collection of personal information

Sections 9, 10 and 11 of the PPIPA provide:

IPP 2: Section 9. Collection of personal information directly from individual

A public sector agency must, in collecting personal information, collect the information directly from the individual to whom the information relates unless:

- (a) the individual has authorised collection of the information from someone else, or
- (b) in the case of information relating to a person who is under the age of 16 years--- the information has been provided by a parent or guardian of the person.

IPP 3: Section 10. Requirements when collecting personal information

If a public sector agency collects personal information from an individual, the agency must take such steps as are reasonable in the circumstances to ensure that, before the information is collected or as soon as practicable after collection, the individual to whom the information relates is made aware of the following:

- (a) the fact that the information is being collected,
- (b) the purposes for which the information is being collected,
- (c) the intended recipients of the information,
- (d) whether the supply of the information by the individual is required by law or is voluntary, and any consequences for the individual if the information (or any part of it) is not provided,
- (e) the existence of any right of access to, and correction of, the information,
- (f) the name and address of the agency that is collecting the information and the agency that is to hold the information.

IPP 4: Section 11. Other requirements relating to collection of personal information

If a public sector agency collects personal information from an individual, the agency must take such steps as are reasonable in the circumstances (having regard to the purposes for which the information is collected) to ensure that:

- (a) the information collected is relevant to that purpose, is not excessive, and is accurate, up to date and complete, and
- (b) the collection of the information does not intrude to an unreasonable extent on the personal affairs of the individual to whom the information relates.

A designated agency, which is a public sector organisation, acting under clause 27 of the Regulation must ensure that it complies with the PPIP Act when collecting and using personal and/or medical information from an authorised carer and/or a member of their household. In particular, the designated agency must ensure that:

- The information is collected directly from the person to whom the information relates. Clause 27 states that it is the authorised carer who must "cause a member of [their] ... household to undergo" a medical examination. A designated agency which requires a household member, who is over the age of sixteen, to undergo a medical examination and provide a report should either collect this information directly from the household member, or should ensure that the household member consents to another person providing this information.
- An authorised carer or member of their household who is required to undertake a medical examination should receive full notification under section 10(a)-(c), regarding the manner in which their information will be dealt with, including notification as to how any medical information provided would specifically be used by the agency and to whom the information may be

disclosed. For example a designated agency may provide a report to a medical practitioner to assess the contents.

- The notification should also comply with section 10(d)-(f) by providing details of: the legislative authority for the collection of information, such as Regulation 27, and the consequences if the information is not provided; the existence of any right of access to, and correction of, the information; and the name and address of the agency that is collecting and will hold the information.
- When collecting personal information the agency should also ensure that the information is relevant, up to date and not excessive. The collection should not intrude unreasonably into an individual's personal affairs. A request for a medical examination and a medical report under clause 27 should be limited to such medical information as will enable the designated agency to ascertain whether "the household is a healthy environment for the care of children or young persons." Other non-related medical or other information should not be collected. Clause 27 should not be used to obtain details of an individual's general medical history or current medical condition unless this information is required by the agency to ascertain whether the household is a healthy environment.

Limits on the use and disclosure of personal information

Sections 17, 18 and 19 of the PPIP Act provide:

IPP 10: Section 17. Limits on use of personal information

A public sector agency that holds personal information must not use the information for a purpose other than that for which it was collected unless:

- (a) the individual to whom the information relates has consented to the use of the information for that other purpose, or
- (b) the other purpose for which the information is used is directly related to the purpose for which the information was collected, or
- (c) the use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual to whom the information relates or of another person.

IPP 11: Section 18. Limits on disclosure of personal information

(1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:

- (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
- (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or

(c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

(2) If personal information is disclosed in accordance with subsection (1) to a person or body that is a public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given to it.

IPP 12: Section 19. Special restrictions on disclosure of personal information

(1) A public sector agency must not disclose personal information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health or sexual activities unless the disclosure is necessary to prevent a serious or imminent threat to the life or health of the individual concerned or another person.

Generally, to comply with section 17 a designated agency must only use medical information provided to it under clause 27 of the Regulation, for the purposes for which it was collected, namely to ascertain whether "the household is a healthy environment for the care of children and young persons", or for a directly related purpose. If a designated agency provides an authorised carer and/or member of their household with adequate notification under section 10 of the PPIP Act as to the circumstances in which their information will be used and disclosed and the likely recipients, the designated agency will be likely to have ensured compliance with section 18(a) and (b).

You will note that sections 17(c), 18(1)(c) and 19(1) also provide for disclosure of an individual's personal information, including information relating to health, in certain circumstances where this is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person, such as a child or young person in the care of the authorised carer.

Exemption from the operation of the PPIP Act

If compliance with an IPP is not possible a public sector designated agency may look to exemptions which authorise their non-compliance. The IPPs may be modified by Privacy Codes of Practice made by the Attorney General under the Act, by a s.41 Direction issued by the Privacy Commissioner where he believes the exemption is in the public interest, or by certain exemptions within the PPIP Act itself.

The PPIP Act contains a number of exemptions that specifically recognise obligations to disclose certain information in order to protect the health and safety of the community. For example, as discussed above, the PPIP Act contains specific provisions that allow the disclosure of sensitive information, such as medical or health related information, in certain circumstances, which include where it is necessary to prevent a serious or imminent threat to the life or health of any person (sections 17(c), 18(1)(c) and 19(1)).

Section 25 of the PPIP Act also provides that privacy obligations on public sector agencies do not prevent the agency from providing the information to another person or organisation, where the disclosure is *authorised, required or permitted* under another Act:

25 Exemptions where non-compliance is lawfully authorised or required

A public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18 or 19 if:

- (a) the agency is lawfully authorised or required not to comply with the principle concerned, or
- (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the State Records Act 1998).

Private sector “designated agencies”

Clause 27 of the Regulation applies to designated agencies which may include external service providers and private sector organisations, such as private adoption agencies, or organisations funded by public sector agencies. The PPIP Act does not bind private sector organisations, however in some circumstances a NSW public sector organisation may be bound to take responsibility for their collection, use or disclosure of personal information. Section 4(4) of the PPIP Act makes public sector agencies responsible for information which is in the possession or control of “a person employed or engaged by the agency in the course of such employment or such engagement”. Private sector organisations, that do not meet that test, may however, be bound by the Commonwealth National Privacy Principles under the *Privacy Act 1988* (Cth).

The Health Records and Information Privacy Act 2002 Act

The Committee should also note that the *Health Records and Information Privacy Act 2002* (the “HRIP Act”), which will commence on 1 July 2004, creates a scheme to regulate the collection and handling of health information in NSW. One of the objects of the Act is to balance the public interest in protecting the privacy of health information with the public interest in the legitimate use of that information. The purpose of the Act is to promote fair and responsible handling of health information by:

- protecting the privacy of an individual’s health information that is held in the public and private sectors, and
- enabling individuals to gain access to their health information, and
 - providing an accessible framework for the resolution of complaints regarding the handling of health information.

The HRIP Act covers both the public and private sector. It applies to every organisation that is a health service provider or that collects, holds or uses health information. In addition to the PPIP Act, the HRIP Act will also apply to designated agencies which obtain health information under clause 27 of the Regulation.

Privacy NSW is currently developing four statutory guidelines under the HRIP Act, which are currently available for public consultation. Further information in relation to the HRIP Act is available on the Privacy NSW website at:

http://www.lawlink.nsw.gov.au/pc.nsf/pages/index_hripa#1

Conclusion

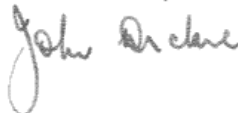
The purpose of clause 27 of the Regulation is to enable a designated agency to ascertain that an authorised carer's household is a healthy environment for the care of children or young persons. The Department of Community Services has notified the Committee that the purpose of clause 27 is to enable the screening of carers and members of their household for communicable disease.

In requesting medical information pursuant to clause 27 public sector agencies, which are designated agencies, must comply with the PPIP Act, and after July 2004 the HRIP Act. From July 2004 private sector designated agencies must also comply with the HRIP Act.

I am unclear as to whether Departmental or other guidelines exist which indicate when a designated agency should employ clause 27, and whether this is specifically limited to situations where there is a threat of the existence of a communicable disease. It may be appropriate for the Department of Community Services to consider developing guidelines to assist designated agencies to identify when clause 27 may be used, for example if the existence of a communicable disease is indicated within the household. Such guidelines could also ensure that while discharging their statutory obligations under child protection legislation, designated agencies also comply with their obligations under the PPIP and HRIP Acts.

I trust that the above is of assistance. I would be pleased to comment further on this matter if sought by the Committee. If you have any queries please contact Ms Rivlin on 9268 5570.

Yours sincerely ,



John Dickie
ACTING PRIVACY COMMISSIONER

07 JAN 2004