

Qualified Privilege and EMER

Advice regarding the status of information entered into the EMER system by individuals.

Background

You may have considered reporting an incident into the Emergency Medicine Events Register (EMER) that you felt had important messages and learnings that the system and your colleagues could benefit from, but wondered about the level of individual or organisational legal protection that would accompany such a quality and safety improvement process. The following summary addresses the key points. More detailed information can be obtained from the web link below.

What is the Qualified Privilege Scheme?

The Commonwealth Qualified Privilege Scheme (the Scheme):

- is a scheme governed by Part VC of the Health Insurance Act 1973 (Cth) (the Act) and Regulations 23A to 23G of the Health Insurance Regulations 1975 (Cth) (the Regulations);
- encourages efficient quality assurance activities in connection with the provision of certain health services: section 124V(1) of the Act;
- encourages health professionals to undertake and participate in quality assurance activities; and
- has been designed to provide important safeguards by protecting certain information from disclosure and protecting persons involved in the activity from civil liability: section 124ZB of the Act.

The Scheme seeks to achieve its objects by:

- prohibiting the disclosure of information that became known solely as a result of the activities: section 124V(2)(a)(i) of the Act;
- providing for the confidentiality of most information that identifies individuals and that becomes known as a result of a declared quality assurance activity;
- prohibiting the production to a court of a document that was brought into existence solely for the purpose of those activities: section 124V(2)(a)(ii) of the Act;
- protecting certain persons (which includes a committee or other body of persons, whether incorporated or unincorporated, and includes a member of such a committee or other body) engaging in those activities in good faith from civil liability in respect of the activities: sections 124V(2)(b), 124W(1) and 124ZB of the Act.

When will the Scheme apply?

In order for the Scheme to apply to a quality assurance activity the Minister for Health and Ageing must make a declaration that Part VC of the Act applies to the activity: section 124X of the Act. The criteria by which an application for a declaration is assessed are contained in the Regulations.

Section 124W(1) of the Act defines a quality assurance activity as:

1. an assessment or evaluation of the quality, or a study of the incidence or causes of conditions or circumstances that may affect the quality, of health services provided by a person, whether before or after the commencement of Part VC of the Act; or

2. the making of a recommendation about the provision of those services as a result of such an assessment, evaluation or study; or
3. the monitoring of the implementation of such a recommendation.

Does the Scheme apply to the EMER?

Yes. EMER was declared as a Quality Assurance Activity by the Minister of Health and Ageing in September 2012. The coverage will expire in September 2017. At this time, the Minister may make a further declaration: section 124X(4) of the Act.

What is the effect of the Scheme?

A person who acquires any information that became known solely as a result of a declared quality assurance activity must not, except for the purpose of that activity or in accordance with an authority given by the Minister of Health and Ageing, directly or indirectly make a record of that information or disclose that information to another person or to a court: section 124Y(1) of the Act.

A person cannot, except when necessary to produce the document or disclose the information for the purposes of Part VC of the Act, be required to:

- produce to a court a document that was brought into existence solely for the purposes of a declared quality assurance activity; or
- disclose to a court any information that became known solely as a result of such an activity: section 124Y(2) of the Act.

What can be disclosed?

The Scheme does not apply to all of the information or documents obtained as a result of a declared quality assurance activity. Disclosure is permitted in the following circumstances:

- where the information or document does not identify, either expressly or by implication, a particular individual or individuals: sections 124Y(3) and (4) of the Act;
- where the person, or each of the persons, who would be directly or indirectly identified by the disclosure consents to that disclosure: section 124Y(5) of the Act;
- where the information is to be disclosed to the Minister of Health and Ageing for the purposes of enabling them to decide whether to authorise disclosure of the information: section 124Y(6) of the Act;
- where the Minister of Health and Ageing authorises the disclosure as the information relates to conduct that may have been a serious offence against a law: section 124Z(1) of the Act.

What cannot be disclosed?

If a quality assurance activity ceases to be a declared quality assurance activity then the declaration continues to apply in respect of information that became known, or a document that was brought into existence, at a time when the activity was a declared quality assurance activity: section 124Y(7) of the Act. Such information cannot be disclosed except in accordance with the terms of the Scheme.

The Minister of Health and Ageing cannot authorise the disclosure of information of a non-factual nature (e.g. a statement of opinion) unless the information consists only of matter contained in a

report prepared by a person who engaged in the quality assurance activity: section 124Z(2) of the Act.

Areas not covered by a declaration

A declaration does not override the general law relating to confidentiality and patient consent (e.g. patient consent is required for a patient's medical records to be viewed by a person other than their treating doctor). Furthermore, the only information protected by a declaration is that which identifies individuals. Therefore, information that does not identify individuals is not protected by a declaration.

How does this work in practice?

In effect this means that any factual information entered in the EMER database such as the date, time, location, patient details and any factual accounts of the incident or the outcome are subject to the Scheme and may be disclosed. However, this does not mean that the data can be disclosed to anyone that requests the data (see section above entitled What can be disclosed?).

Any information provided during the incident notification that is non-factual or an opinion (such as contributing factors, prevention or what minimised the incident) generally cannot be disclosed.

Can I provide the information to others?

A person involved in a declared quality assurance activity must not disclose information or documents that became known or were obtained solely as a result of the activity. It is an offence if a person does not comply and serious penalties apply (two years imprisonment) for those persons found to have disclosed information without authorisation of the Minister.

What about State or Territory Laws?

The Scheme is designed to complement not override any corresponding State or Territory laws. The Scheme does not exclude or affect the operation of any other State or Territory laws and applies only to the extent to which any other relevant State or Territory laws would not otherwise apply: section 124ZC of the Act. The Scheme allows for quality assurance activities to be protected when they take place in more than one State or Territory (e.g. a national study) or when there is no State or Territory legislation in place.

How do I know what is and isn't protected?

It is advisable that when entering factual information no identifying information is included and that generic terms are used. For example:

The patient was reviewed by Dr A and Nurse B. As opposed to:

Mrs Smith was reviewed by Dr Jones and Nurse Williams,

Reporting of incidents to EMER is anonymous and you are not required to leave any identifying information pertaining to yourself and for this purpose these fields have not been included in the notification screen. The designation of the notifier is a mandatory field as it allows for identification of the type of staff reporting the incident, such as trainees, but does not specifically identify that person by name.

Key points to remember

The key point to remember is that the Commonwealth Qualified Privilege Scheme was designed to promote and encourage quality assurance activities by offering protection for individuals who choose to become involved either through reporting or assessing and evaluating an activity. The aim of this is to improve, not hinder, patient safety and quality of care, and it is vital that a safety and reporting culture be encouraged. This is strongly supported by consumers.

References

Department of Health and Ageing Qualified Privilege scheme

<http://www.health.gov.au/internet/main/publishing.nsf/Content/qps-legis>