SUBPOENAS AND PSYCHIATRIST–PATIENT CONFIDENTIALITY

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The Royal Australian & New Zealand College of Psychiatrists

The use of subpoenas to access patient records without consent has been a topic of increasing concern to Australian psychiatrists in recent years. The Royal Australian and New Zealand College of Psychiatrists (RANZCP) represents over 4000 fully qualified psychiatrists in Australia, and has developed a position statement that addresses these concerns: *Patient–psychiatrist confidentiality: the issue of subpoenas* (October 2016).

Psychiatrists have ethical and professional obligations to maintain the confidentiality of patient disclosures unless patients give informed consent to sharing that information. When sensitive clinical records are disclosed without patient consent, patients are exposed to a range of harms. They may be re-traumatised, and they frequently experience feelings of shame, stigma and helplessness. They may censor what they say to psychiatrists (creating a risk of misdiagnosis) or cease therapy altogether.

Although subpoenas generally serve the public interest in bringing all relevant evidence before the court, the harms posed to current, former and potential patients are significant, and can undermine the public interest in delivering effective mental health care.

Judges in Australia and elsewhere have acknowledged the tension between these public interests, and the Australian, NSW, WA and Victorian Law Reform Commissions have proposed to alleviate these tensions through the adoption of a professional confidential relationships privilege (PCPR) into all Australian Evidence Acts. Currently, the privilege only exists in NSW, WA, Tasmania and the ACT. The privilege allows judges to use their discretion to set aside a subpoena if satisfied that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and the nature and extent of the harm outweighs the desirability of the evidence being given.

The RANZCP supports this law reform proposal and seeks to highlight the stronger protections for clinical record confidentiality which exist in comparable countries such as New Zealand. Law reform is only part of the answer, however. Everyday legal practice has a vital role to play. Even in jurisdictions that lack the PCPR, judges have a range of options to mitigate the harms posed by clinical record subpoenas, such as making greater use of closed courts and restricting inspection of subpoenaed material. Lawyers can also consider using alternative, less invasive means to obtain evidence, and if subpoenas are considered necessary, they can be drafted in narrower terms which preserve the confidentiality of sensitive material that is irrelevant to the case.

The RANZCP is committed to engaging with judiciary and legal profession in order to raise awareness of these issues and to develop practical solutions.