

## **Statutory Privilege under section 23 of the *Health Administration Act 1982***

### **Legal Branch guidance**

Under section 23(1) of the *Health Administration Act 1982* (the Act) the Minister may, by order published in the Gazette, authorise any specified person or body, including a council, committee or advisory body, to conduct research or conduct investigations into morbidity or mortality occurring within New South Wales.

#### **What the Privilege means**

Authorisation under section 23 imposes restrictions on the disclosure of information developed for or by the authorised committee.

The privilege operates on two levels:

Firstly, section 23(3) makes it an offence for a person who obtains information in connection with the work of the authorised committee to disclose the information. Any person who breaches this provision is liable to a penalty of up to, but not exceeding, 10 penalty units or to imprisonment for a term up to, but not exceeding, 6 months. Under section 23(3), information can only be released:

- (a) With the consent of the person from whom the information was obtained, or
- (b) With the approval of the Minister.

Secondly, in accordance with section 23(4), a person who has obtained any information in connection with the conduct of research or investigations in accordance with an authorisation under section 23 is neither competent nor compellable in any proceedings to answer any question, or produce any documents, relating to any such information. Documents can be produced and oral evidence given only with the approval of the Governor.

#### **What is protected by the privilege provided under the Act?**

The privilege applies to authorised committee members and persons who prepare information, reports, summaries or opinions for a committee. It also generally covers any material prepared by or for the Committee since the date of its establishment.

It prevents Committee members and those who have assisted a Committee in its work (through for example the preparation of expert reports) from being compelled to produce that information or give evidence about it.

#### **What the privilege does not cover**

While the Privilege provided to an authorised Committee is broad, it is not absolute. For example, the privilege does not cover:

- Pre-existing documents created for other purposes, such as medical records or other records created regarding general care of patients or management of the health service, and not as part of or in response to a request from an authorised Committee;

- Any information held by the Ministry or public health organisation generated by any investigation or other action taken in managing an adverse incident or complaint which is generated outside the authorised committee or RIB process.

### **What disclosures are allowable?**

The privilege does not prevent:

- Release of information or reporting of aggregated data provided for in the respective committee's terms of reference or functions (on the basis that such disclosure is authorised by the Minister);
- Any disclosure otherwise authorised by the Minister (section 23(3)(b));
- Provision of information in any kind of proceedings where the Governor has approved the disclosure (section 23(4)).

### **What systems must be put in place to support committees?**

The purpose and effect of the privilege is to limit the movement and dissemination of material that is subject to consideration by an authorised person or body. A direction from a court or other official body to produce information may arise years after the information was created, or may be directed to persons who are unaware of the application of the privilege to particular documents. Processes need to be put in place to ensure the privilege is complied with and information and individual documents covered by the privilege can be readily identified.

To this end, Committee Secretariats (or other persons responsible) must have procedures in place to:

- Control movement of information covered by the privilege to prevent breaches of the confidentiality provisions;
- Keep a record of bodies or persons authorised to obtain information so there is ready identification of persons who are protected by the privilege and not compellable to give evidence;
- Ensure Committee members are aware of the privilege, and their obligations under the Act;
- Ensure any material generated by the Committee is appropriately notated "privileged" and stored separately and securely to ensure ready identification in the event of a subpoena or other direction to produce or release.

### **Authorised Committees**

Authorised Committees that have statutory privilege under section 23 of the *Health Administration Act 1982* are coordinated by the Clinical Excellence Commission.

<http://www.cec.health.nsw.gov.au/>