

## 11 Using and disclosing personal health information (HPPs 10 & 11)

In general terms, a **'use'** of personal health information refers to the communication or handling of information within NSW Health.

NSW Health is a single agency for the purposes of the Health Privacy Principles. Therefore sharing health information between health services is considered a 'use' (see Section 3.2 NSW Health agencies to be treated as a single agency).

A **'disclosure'** refers to the communication or transfer of information outside NSW Health. A disclosure can occur by:

- giving a copy of the information to another organisation or individual
- allowing another organisation or individual to have access to the information
- giving out summaries, or communicating the information in any other way.

As part of good clinical practice, patients should be included in decisions regarding the use and disclosure of their personal health information. This may occur for example, at the time of collecting consent for treatment, or during consultation with the patient.

Use and disclosure are treated together as privacy law generally imposes the same conditions on both activities. The one exception is that the disclosure provisions also allow disclosure on compassionate grounds (see Section 11.2.9), this does not apply to "use".

There are three broad categories of use and disclosure authorised under privacy law:

- where information is used or disclosed for the "primary purpose" for which it is collected OR
- where information is used or disclosed for another "secondary purpose", and one of the criteria listed in the HPPs applies OR
- where the use or disclosure of the information is lawfully authorised.

Activities which fall outside of these three categories, are not permitted without patient consent unless a special exemption pursuant to section 62 of the *HRIP Act* is obtained. Section 15 Common privacy issues provides guidance on how to address some of these circumstances, including requests for media access (see Section 15.7) and fundraising (see Section 15.8).

**It should be noted that NSW Health staff may only view, access, use and disclose personal health information when it is necessary for them to do so in order to carry out their work duties.**

If a staff member is in doubt as to whether they are permitted to access, use or disclose personal health information, they should seek advice from a senior manager, local Health Information Service or local Privacy Contact Officer.

## 11.1 Use and disclosure for the “primary purpose”

A health service may use or disclose information it has collected for the purpose for which it was collected. The primary purpose will generally be the “dominant purpose” for which the information was collected. Most often in the health system, the purpose for collecting personal health information will be to provide a health service.

*Example: a person is admitted to hospital for exploratory surgery for suspected cancer. The “primary purpose” for collecting their information at admission is to provide this service, and will allow disclosure to those involved in the surgery, and others involved in providing the service, e.g. health care providers including nursing staff, anaesthetists and pathologists*

*Example: some months after the patient’s discharge, the oncology unit proposes to conduct a fundraising drive, and proposes to use the information from health records to target recent admissions. As fundraising was not the “primary purpose” for which this information was collected, and is not an authorised secondary purpose under the privacy laws, the oncology unit can only use the personal health information for this purpose if patient consent for contact was obtained at the time of collection of their personal health information as consent is required prior to using patient information for fundraising purposes.*

## 11.2 Use and disclosure for a “secondary purpose”

The health service may also use or disclose information for another “secondary purpose” if this is covered by one of the exemptions listed to HPPs 10(1) and 11(1). The secondary purposes listed under HPPs 10 and 11 are:

- use or disclosure for a directly related purpose, which would be “reasonably expected” by the individual (see Section 11.2.1)
- use or disclosure to which the individual has consented (see Section 11.2.2)
- use or disclosure to prevent a serious threat to health or welfare (see Section 11.2.3)
- use or disclosure for management, training or research purposes (see Section 11.2.4)
- use or disclosure to assist in finding a missing person (see Section 11.2.5)
- use or disclosure as part of investigating and reporting wrong conduct (see Section 11.2.6)
- use or disclosure to or by a law enforcement agency or investigative agency (see Sections 11.2.7 and 11.2.8)
- disclosure made on compassionate grounds (see Section 11.2.9).

The information may also be used or disclosed if there is a “lawful authorisation” to do so (see Section 11.3).

### 11.2.1 Directly related purpose HPP 10 & 11(1)(b)

A health service may use or disclose the personal health information it has collected about an individual if it is a **directly related purpose** to the primary purpose, and the **individual would reasonably expect** the health service to use the information for this purpose.

Health staff should be aware that some patients will not share the same general expectations as other patients for a variety of reasons, for example, if they have previously received health care in a different country, or if they are particularly sensitive about aspects of their health care. Health staff should make special efforts as are reasonable in the circumstances to explain to patients how patient information is generally used and disclosed.

Directly related purpose often arises in the health system, particularly in relation to sharing information with other health care providers (see Section 15.1 Third party health care providers).

### 11.2.1.1 “Directly related purpose”

This recognises there are activities necessary, such as provision of ongoing care, billing and following up test results which may not fall within the primary purpose for which the information was collected.

What will be a directly related purpose will vary depending on the circumstances. There are however some common examples of what is likely to fall within the ‘directly related purpose’ exemption. These include:

- using the information to provide ongoing care to patients

*Example: An antenatal unit from another hospital is requesting a copy of a patient’s health records relating to her previous pregnancy. As information relating to a previous pregnancy is likely to be relevant to the current pregnancy, it can be provided on the basis of ongoing care. It would also be expected that as a matter of good clinical practice the hospital requesting the information would have discussed this with the patient prior to making the request.*

- disclosing health information to the patient’s nominated GP, other treating health services, hospitals or medical specialists involved in the care and treatment of a patient
- providing relevant health information to carers to assist with care for the patient
- sending reminders to a patient where the person receives a service on a regular basis or requires a follow up service
- administrative activities associated with providing, following up on or receiving payment for the service or product and follow up on an overdue payment (including disclosures to a debt collector). The information provided should be limited to what is relevant to the claim
- using the information to manage the provision of the service or product
- contacting a patient for feedback on the services received for the purpose of evaluation and improvement of services
- providing relevant patient information to accredited hospital chaplains and pastoral care workers providing spiritual and pastoral care in accordance with the *Health Records and Information Privacy Regulation 2012* (see Section 11.2.10 Chaplaincy services)
- sharing relevant patient information with students and other staff for training purposes (see Section 11.2.4.2 Statutory guidelines)
- maintaining lists of patient names for patient care and safety purposes, for example, maintaining patient lists for fire evacuation for use by the fire brigade in event of an emergency, etc.
- using patient information for purposes relating to the operation of the NSW health service and treatment of patients, including funding, planning, safety and quality improvement activities
- using information for quality assurance or clinical audit activities carried out by the health service such as monitoring, evaluating, auditing the provision of the particular product or service the health service has or is providing the person (including compliance with the NSW Patient Safety and Clinical Quality Program)
- disclosing information to an auditor or quality assessor for the purposes of monitoring, evaluating, auditing the provision of a particular product or service the health service has provided or is providing to the person (as long as the individual reviewing the health records is bound by privacy legislation or a professional code of ethics)
- some management and research activities may be considered a purpose directly related to health service delivery (see Section 11.2.4 Management, training or research)
- using the information to investigate complaints about care provided by the health service or patient safety
- disclosing information to enable follow-up of complaints about the service or a product, or recalls of a product
- using or disclosing information to claims managers and associated persons in the course of managing a complaint, legal action or claim brought against the health service.

### 11.2.1.2 “Reasonable expectation”

While the definition of directly related purpose is quite broad, the purpose must also be within the “reasonable expectation” of the patient. This means that the purpose is closely related to the care and treatment **and/or** that the use or disclosure was communicated when the information was collected. The information given to the patient at the time of collection thus becomes important.

Where it is made clear to the person as part of the collection process that their information may be used or disclosed for these purposes, then there is a more persuasive argument that the person would ‘reasonably expect’ you to use or disclose their information in these ways.



#### Further guidance

- Section 7 – Collecting personal health information (HPPS 1-4), sets out the types of information that needs to be provided and the ways it may be given.
- Appendix 5 – Pro Forma Privacy Leaflet for Patients.

### 11.2.1.3 Outside a patient’s “reasonable expectation”

In rare circumstances, a patient may make a special request that their personal health information is not used or disclosed for purposes described in this Manual as directly related to the patient’s health care (see Section 11.2.1.1 “Directly related purpose”).

When health service staff receive such a request, it will be situation specific and the professional judgement of local health service staff will be required to resolve such requests. To assist staff in reaching a judgement, the following guidance is provided.

1. A senior clinician should consider whether it is reasonable and practicable to meet the patient’s request without putting the patient, staff member or any other person at risk of harm. Wherever it is possible to meet the patient’s request, reasonable steps should be taken to comply with the request, and this should be documented in the patient’s health record.
2. Where it is not possible to comply with a patient’s special request, a senior clinician (and other health service staff as necessary) should discuss with the patient:
  - a. the reasons for the patient’s concerns about sharing the information
  - b. the reasons why there is a need to share information with all health service staff involved in their care
  - c. the obligations all staff have under privacy law to ensure all personal health information is kept confidential
  - d. the consequences for the patient’s health care if personal health information is not shared.
3. If the patient remains of the view that they wish information to be withheld and it is the opinion of the treating health practitioner that sharing the information is essential to provide the health service in a safe or appropriate manner, the question then becomes one of whether the patient is prepared to consent to the treatment itself.

The service provider should explain this to the patient and that the facility is unable to provide health services to the patient given this effective refusal. Where appropriate, the facility may wish to offer to refer the patient to another facility, or suggest that the patient considers seeking services from another facility.

It is anticipated that the occasions where a service provider will be required to consider the matter as a refusal of medical treatment will be extremely rare. Staff should work with the patient to resolve the issues and should also contact the Privacy Contact Officer for their health service to liaise with the patient and to participate in resolving such matters.

## 11.2.2 Consent HPP 10 & 11(1)(a)

This section is to be read in conjunction with Section 5.4 Consent.

### 11.2.2.1 Where a third party seeks access

The need for a consent may arise when a third party seeks access to an individual's health record. A patient can consent to, or authorise, any third party, such as a family member, interpreter, health practitioner (not involved in their ongoing care), legal representative, employer, or insurer to have access to his or her health record.

Members of parliament making representations on behalf of a constituent are also required to have authorisation from the patient.

Consent must be provided by the patient prior to a third party gaining access to a patient's health information.

Requests for access to health records by a third party may occur in a number of circumstances, for example:

- Where the patient lacks the capacity to consent, the patient's authorised representative may consent on behalf of the patient (see Section 5.6 Authorised representative)
- Where the patient is deceased, it is possible that an immediate family member may be provided with access to relevant health records if they are the executor of the will or otherwise on compassionate grounds (see Section 11.2.9 Disclosure on compassionate grounds).

Where a family member is unable to gain consent from the patient, or the patient's authorised representative, for example, in circumstances of family dispute or estrangement, the health service may consider providing access on compassionate grounds, see Section 11.2.9.

The procedures which should be followed in such cases are set out below.

The consent should be in writing and be signed by the patient, or their authorised representative. A photocopy of the original consent document can be accepted when provided by the patient, third parties (such as the patient's legal representative or insurer) and other government agencies.

The consent should contain:

- full name of patient
- date of birth
- contact details (e.g. current address, telephone number, email address)
- date of written consent, (see Section 5.4.1 Elements of consent)
- details of the records or information sought, including range of dates for health treatment
- name of person being authorised and their relationship to the patient
- the purpose for which the information is requested (where relevant).

These requirements are to ensure both the patient and their health records are accurately identified, and to ensure only relevant information is released.

If the health service has reasonable grounds for concern regarding the validity or authenticity of the consent, it should contact the third party and/ or patient directly for clarification.

The precise authority of the person requesting access and the nature of that access should be checked to ensure that only relevant material is released.

Sometimes a health record will include information about people other than the patient. Health records should be carefully reviewed before release to check for and remove any third party information in order to avoid a breach of privacy of the third party.

Where the request is made for information related to an insurance or compensation claim, a photocopy of the insurance application or compensation claim form, signed and dated by the patient, containing the patient's consent to disclosure, is sufficient authority for the release of relevant health records. It will normally be sufficient for the health service to provide a medical report or summary of injuries for such claims to be processed. If further information is requested, only relevant sections of the patient's health record may be provided. Patient consent is required for disclosure of additional health records.

### ***Proof of identity***



#### **Further guidance**

- Section 12.6 Obtain proof of identity

### ***Conditions of access***

Access may be provided by direct access to the health information via provision of photocopies of relevant material, and which is appropriately redacted, or viewing of the health record on the health service's premises. A health practitioner or health information manager must always supervise access to original health records.

### ***Fees and charges***

Where the person requests copies of a health record, the fees and charges may be required as set out in the relevant NSW Health policy and information bulletin.

The above requirements for consent and conditions of access also apply where the applicant is the patient's legal representative.



#### **Further guidance**

- Section 5.4 Consent
- Section 12 Patient access and amendment (HPPs 6, 7 & 8)
- PD2006\_050: Health Records and Medical/Clinical Reports – Charging Policy
- IB2013\_032: Health Records & Medical/ Clinical Reports – Rates.

### ***11.2.2.2 Where the health service seeks to use or disclose***

The proposed use or disclosure may also be initiated by the health service. This may be particularly relevant where the use or disclosure of the information is not a “directly related purpose”. In such cases, the health service should:

- consider whether the patient has adequate capacity to give consent (see Section 5.4 Consent)
- address the elements of consent outlined in Section 5.4.1 Elements of consent
- make a written record of the consent, either through a written consent form signed by the patient or by a contemporaneous note of a verbal consent recorded in the patient's health record.

In deciding whether to obtain a written or oral consent from the patient, the following factors should be considered:

- A written consent is the strongest evidence that the patient has given their consent, and so would normally be obtained at admission, on commencement of the therapeutic relationship, or where there are many or complex issues the patient needs to consider before consenting.
- Written consent should also be obtained where the information is proposed to be used or disclosed for a purpose unrelated to the reason for its collection, for example, using a 'good news' story in a hospital newsletter, or fundraising (see Section 15.8 Fundraising).
- Written consent is not required for day to day disclosures relating to ongoing care and treatment, or actions covered by an existing written consent, or is otherwise allowed under the Health Privacy Principles.

### 11.2.3 To prevent a serious and imminent threat to health or welfare HPP 10&11 (1)(c)

A health service may use or disclose personal health information if there are reasonable grounds for believing that this is necessary to lessen or prevent:

- a **serious and imminent threat** to the life, health or safety of the individual or another person, or
- a serious threat to **public health or public safety**.

#### 11.2.3.1 General guidelines

Health staff should be aware that these situations are unlikely to arise in day to day case management and so disclosure on this basis will be a relatively uncommon occurrence.

In circumstances where a health practitioner considers that a patient represents a risk to themselves or others, they should carefully assess the level of risk before acting. It is advisable to discuss the situation with colleagues or a senior health practitioner before acting.

*Example: A patient of a community health service arrives in an agitated state, making threats against a close family member over a custody dispute, and leaves. The patient has a history of violence and faced previous assault charges over the same matter. Staff would have reasonable grounds to believe the relative was at serious and imminent risk, and so could disclose the information in order to address this risk.*

*Example: A Public Health Unit conducting an investigation and monitoring confirmed or suspected cases of meningococcal infection on a cruise ship which has now left NSW, but will be stopping at another Australian port shortly. The Unit would be entitled to share the information with relevant authorities to ensure the serious public health risk is properly addressed.*

#### 11.2.3.2 Where staff may be at risk

Sharing of information about a patient's violent behaviour is permitted when the patient is referred or transferred within or between facilities (including community health services, aged care facilities, etc.), and when the patient poses a threat to themselves or any individual including staff, or to public health or public safety. Key principles to managing violent behaviour are:

1. Privacy obligations must be balanced with health service's obligations to ensure a safe workplace under the *Work Health and Safety Act 2011*.
2. Relevant patient information should be made available when referring or transferring a patient to ensure patient and staff safety during transfer and to prevent adverse incidents.
3. When sharing information about a patient, focus on patient behaviours that may pose a threat or risk, and appropriate patient management strategies.
4. A health service must take reasonable steps to ensure the information they share is accurate, relevant, up to date, complete and not misleading.
5. Use patient alerts or patient flagging in accordance with '*Zero Tolerance: Response to violence in NSW Health workplace*'.



#### Further guidance

- PD2005\_315: Zero Tolerance: Response to violence in NSW Health workplace
- PD2005\_409: NSW Health Workplace Health and Safety – Policy and Better Practice Guide
- PD2005\_339: Protecting People and Property: NSW Health Policy and Guidelines for Security Risk Management in Health Facilities

Contact: Workplace Relations Branch, NSW Ministry of Health

### 11.2.3.3 Public Health Act 2010 – Notification of public health risk

The *Public Health Act* allows for the disclosure of personal health information in limited circumstances between authorities and practitioners where it is suspected on reasonable grounds that a person has a category 4 or 5 condition and the failure to provide the information could place the health of the public at risk. A category 4 or 5 condition includes HIV, AIDS and TB.

If staff are concerned about a possible health risk relating to HIV or the behaviour of an HIV positive person, they should contact their local HIV co-ordinator, or the HIV and STI (Sexually Transmissible Infections) Branch, NSW Ministry of Health.

See Section 4.1.3.2 HIV/AIDS-related information, for information on the *Public Health Act* limitations imposed on the disclosure of information indicating a person's HIV status, and information that a person has undergone an HIV test.



#### Further guidance

- Section 15.9.6 Managing public health risks
- PD2005\_184: Contact Tracing Guidelines for Sexually Transmissible Diseases and Blood Borne Viruses
- PD2009\_023: HIV – Management of People with HIV Who Risk Infecting Others
- PD2005\_068: Tuberculosis Management of People Knowingly Placing Others at Risk of Infection
- PD2005\_162: Health Care Workers Infected

### 11.2.3.4 Genetic information

Since 2014, the HRIP Act has included provisions and processes for genetic information, which allows for the disclosure of genetic information to genetic relatives without patient consent, albeit in very limited circumstances. Genetic relative means a person who is related to an individual by blood, for example, a sibling, parent or descendant of the individual.

Under HPPs 10 & 11(1)(c1) genetic information can be used and disclosed where:

- i. The disclosure is to a genetic relative of the individual to whom the genetic information relates, and
- ii. It is reasonably believed to be necessary to lessen or prevent a serious threat to the life, health or safety (whether or not the threat is imminent) of that genetic relative, and
- iii. The disclosure is made in accordance with guidelines, if any, issued by the NSW Privacy Commissioner for the purposes of this paragraph.

The NSW Privacy Commissioner has issued guidelines entitled “Use and disclosure of genetic information to a patient’s genetic relatives: Guidelines for organisations in NSW” available at: [www.ipc.nsw.gov.au/](http://www.ipc.nsw.gov.au/)

The Guidelines reflect similar guidelines already issued under Federal Privacy Law. They encourage health practitioners to take all reasonable steps to obtain consent from the patient (or authorised representative), and to consult with other experienced health practitioners in the first instance. They also make clear that if a disclosure occurs, only information that is necessary to communicate the risk of harm should be disclosed and, where possible, the patient should not be identified.

The guidelines may assist an individual and their health practitioner to gain access to relevant records of a deceased genetic relative of the individual where the authorised representative (such as the executor of the deceased person’s estate) has refused to consent on behalf of the patient, and the genetic relative is considered to be at serious risk. Alternatively, where the deceased person is “an immediate family member”, the genetic relative may wish to seek access to the health records on compassionate grounds (see Section 11.2.9 Disclosure on compassionate grounds).



It should be noted that the scope of the Guidelines does not include situations concerning genetic information that present a serious threat to an unborn child. The patient's consent to disclose genetic information about themselves to a pregnant mother would be required.



#### Further guidance

- IB2014\_065: Information & Privacy Commission Guideline: Use & disclosure of genetic information without consent
- Section 11.2.9 Disclosure on compassionate grounds

### 11.2.4 Management, training or research HPPs 10 & 11 (1) (d), (e) & (f)

A health service may use or disclose personal health information if this is reasonably necessary for:

- **funding, management, planning** or evaluation of health services or
- **training** the health service's staff members or people who work with the health service or
- **research** or the compilation or analysis of statistics in the public interest and
- the use or disclosure is in accordance with **Statutory guidelines** issued by the NSW Privacy Commissioner.

#### 11.2.4.1 When to use this exemption

Many funding, management, and planning purposes will be a "directly related purpose" (see Section 11.2.1.1), so you should first check if that exemption applies before considering these exemptions. Each of the exceptions for management, training and research has certain preconditions before it can be applied. These are:

##### *The use or disclosure is reasonably necessary for the purpose*

The health service must consider to what degree the personal health information is needed for the activity. For example, sometimes the activity may be just as effectively undertaken using hypothetical case studies, or simulated situations.

##### *The purpose cannot be served by de-identified information*

If the activity could be undertaken by using/disclosing de-identified information, the provision requires the health service to proceed in that way. This may involve converting 'identifiable' information (information that allows identification of a specific individual) into 'de-identified' information.

De-identified information is information from which identifiers have been permanently removed, or where identifiers have never been included. De-identified information cannot be re-identified.

Sometimes de-identified information cannot achieve the purpose of the management of health services activity. This could be, for example, where an activity involves linking information about individuals from two or more sources and identified information is needed to correctly link records from each data source.

##### *It is impracticable to seek the person's consent*

The fact that seeking consent is inconvenient or would involve some effort or expense is not of itself sufficient to warrant it 'impracticable'. Some examples of where it might be impracticable to seek consent include if:

- the age or volume of the information is such that it would be very difficult or even impossible to track down all the individuals involved
- there are no current contact details for the individuals in question and there is insufficient information to get up-to-date contact details
- a complete sample is essential to the integrity and success of the management of health services activity and the activity would not be possible if any persons refused to allow their information to be used.

### ***Reasonable steps have been taken to de-identify the information***

When de-identifying information, you should consider the capacity of the person or organisation receiving the information to re-identify it or link it to identifiable information.

Removing the name and address may not always be enough, particularly if there are unusual features in the case, a small population, or there is a discussion of a rare clinical condition.

Reasonable steps to de-identify might also include removing other features, such as date of birth, ethnic background, and diagnosis that could otherwise allow an individual to be identified in certain circumstances.

### ***The information will not be published in a generally available publication***

A 'generally available publication' is a publication that is generally available to members of the public, either in paper or electronic form.

#### ***11.2.4.2 Statutory guidelines***

The NSW Privacy Commissioner, Information and Privacy Commission NSW, has issued Statutory guidelines that set out conditions imposed on use and disclosure of personal health information for management, research and training.

To view the Statutory guidelines, go to:  
[www.ipc.nsw.gov.au/privacy/ipc\\_legislation.html](http://www.ipc.nsw.gov.au/privacy/ipc_legislation.html)

#### ***Management guidelines***

The management guidelines discuss each of the preconditions in detail, and draws attention to the relevant "directly related purpose" which may otherwise apply. The guidelines then provide for a Human Research Ethics Committee to consider the proposed use or disclosure and assess whether, on balance it is in the public interest.

#### ***Research guidelines***

The research guidelines are consistent with and mirror the guidelines developed by the NHMRC under sections 95 and 95A of the *Privacy Act 1988 (Commonwealth)*. Research requiring use or disclosure of personal health information will need to be considered by a Human Research Ethics Committee.

#### ***Training guidelines***

The training guidelines define the circumstances in which personal information can be used in training. The emphasis is on de-identifying the information, except in cases such as student placements where de-identification would defeat the purpose of the training. The guidelines then set requirements for managing such training.

The guidelines recognise a distinction between training and demonstrations and education programs involving clinical placements, as follows:

#### ***Training and demonstrations***

The anonymity of patients should be maintained during case presentations, demonstrations, research activities and at seminars and conferences. Where possible, fictitious data should be used.

Use of photos, slides and other visual aids which allow identification of individuals should not occur unless the material is of critical importance and the consent of the patient has been obtained.

Individual features which may identify them include their face, birth marks, scars, tattoos, piercings, and other features which may be unique to an individual.

Also see Section 9.2.7 Training and presentations.

### Clinical placements and students

Student health professionals must sign a Privacy undertaking (see Appendix 3), and must comply with privacy law and all NSW Health policies.

Students may have access to health records with the approval and under the direction of their supervisor if that access is sought in respect of their education program at the health facility. Access does not include photocopying or transcribing records containing personal health information, or taking such health records off-site. Patients may refuse to have a student participate in their treatment.



#### Further guidance

- To view the Statutory guidelines, go to [www.ipc.nsw.gov.au/privacy/ipc\\_legislation.html](http://www.ipc.nsw.gov.au/privacy/ipc_legislation.html)
- PD2012\_051: Disclosure of Unit Record Data held in NSW Ministry of Health Data Collections for the Purposes of Research or Management of Health Services

### 11.2.5 Finding a missing person

#### HPPs 10(1)(g) & 11(1)(h)

A health service may use or disclose personal health information if the information is to be used by a law enforcement agency to ascertain the whereabouts of a missing person. This exemption only applies if the person has been reported to the police as missing.

*Example: Police have received a report from a family that their 17-year-old son is missing. The boy has a chronic condition requiring regular treatment in hospital. The police request information from a hospital to ascertain if he has been admitted as a result of failure to take his medication. The hospital would be permitted, but not obliged, to provide this information under this provision.*

### 11.2.6 Investigating and reporting wrong conduct HPP 10(1)(h) & 11(1)(i)

A health service may use or disclose personal health information if the health service has reasonable grounds to suspect that there has been or there is the possibility of unlawful activity, unsatisfactory professional conduct or professional misconduct under health registration legislation, or conduct by a staff member that may be grounds for disciplinary action. Disciplinary policies should be followed when using or disclosing personal health information for these purposes. Staff and patients should be made generally aware in staff contracts/ patient leaflets that information about them may be subject to such uses and disclosures.

The exemption allows use or disclosure of the information necessary for the health service to investigate or report the conduct in question. It covers:

- information to be provided to the Health Care Complaints Commission or a NSW Health Professional Council or National Board
- information to be provided to units of the NSW Health department which may conduct investigations into breaches of legislation, including the Pharmaceutical Services Unit (NSW Ministry of Health)
- information to be shared between these investigative units within NSW Health.

#### 11.2.6.1 Public Interest Disclosures

When examining reports of wrong conduct, consideration should be given to whether the report may be considered a Public Interest Disclosure (PID) under the provisions of the *Public Interest Disclosures Act 2004*. Reports of wrongdoing in a privacy related matter may relate to corrupt conduct or a government information contravention. Reports of wrongdoing made by public officials can attract the provisions of the *Public Interest Disclosures Act 2004* and should be referred to the PID co-ordinator or Chief Executive for consideration.



## Further guidance

PD2011\_061: Public Interest Disclosures

### 11.2.7 Law enforcement agencies, including police HPPs 10(1)(i) & 11 (1)(j)

HPP's 10 and 11 allow health services to disclose personal health information to law enforcement agencies. In order to do so:

- the disclosure must be **reasonably necessary** to the functions of the law enforcement agency
- there are reasonable grounds to believe that an **offence may have been or may be committed**.

#### 11.2.7.1 What is a “law enforcement agency?”

The *HRIP Act* recognises the following agencies as law enforcement agencies:

- NSW Police or the police force of another State or a Territory
- Australian Federal Police
- NSW Director of Public Prosecutions (or equivalent office in another State, Territory or the Commonwealth)
- NSW Crime Commission
- Australian Crime Commission
- Corrective Services NSW
- Juvenile Justice NSW

#### 11.2.7.2 What sort of information can be provided?

The law enforcement exemption under HPP's 10 and 11 is very broad. It covers any information relating to an offence which has or may be committed, provided that information is “reasonably necessary” to assist the law enforcement agency to perform its functions.

This exemption does **not oblige** health services to supply the information. Health services need to balance the important public interest in assisting law enforcement agencies to pursue their law enforcement and public protection functions with their own obligations of confidentiality to their patients and the sensitive nature of health information.

Generally, the information supplied should be limited to confirmation of identity and address.

The only exception is where the police can confirm they are actively investigating the commission of an offence and that the information is ‘essential to the execution of their duty’. In such circumstances, there may sometimes be situations where additional, limited clinical information can be provided to the police, where appropriate. Careful consideration should be given to additional information provided, having regard to:

- the seriousness of the offence involved. For example, does it involve an offence involving serious physical harm, such as attempted murder or assault?
- the level of public risk. Is there an ongoing public risk or risk to particular individuals that would be addressed by the health service providing information (this also falls into HPP 11(1)(c), Disclosure to address a serious threat to health or welfare – see Section 11.2.3).
- the impact of the disclosure on patient care and the therapeutic relationship. The nature of the service being provided and the potential that the patient may discontinue obtaining care and treatment, should be considered, as well as the possible impact on the patient’s mental state or wellbeing.

In some other circumstances, NSW Health policy may require reporting of a criminal offence or other conduct to the police or another agency. The NSW Health policy directive ‘Identifying and Responding to Domestic Violence’ states that in certain circumstances health staff must report to the police, regardless of the wishes of the victim. These circumstances may involve the victim sustaining serious injuries such as broken bones the perpetrator having access to a weapon and is making threats or there is an immediate risk to public safety or health staff are threatened.

If after considering these matters, a health practitioner decides it is appropriate to provide additional information, consultation should first occur with a more senior health care provider. Depending on the nature of the request, staff may also seek advice from the Privacy Contact Officer or a senior health service manager.

**Any other information may only be provided with patient consent or in response to a search warrant or subpoena** (see Section 11.3.6 Search warrants and subpoenas).



#### Further guidance

- Section 11.3.4 Reporting 'serious criminal offences'
- Section 15.2 Requests from State and Federal Police

#### 11.2.7.3 Certificate of expert evidence

Evidence in legal proceedings is normally provided verbally, however, under certain circumstances, expert opinions or technical evidence may be given in a court proceeding without requiring the expert or technician to attend the proceedings as a witness. The *Evidence Act 1995* allows for this to be done through providing a 'certificate of expert evidence'.

The certificate of expert evidence cannot be provided without the consent of the patient to whom the certificate relates.

A request for a certificate of expert evidence is not a subpoena, search warrant or court order, and a health service is therefore not obliged to provide it nor does privacy law automatically 'authorise' release in this form. Therefore caution should be exercised prior to release, particularly where the doctor is no longer employed or is not otherwise available to review the patient's records on site prior to compiling the certificate. In circumstances where the health service decides to send patient records off-site to a doctor for review, these should be password protected (or de-identified, with the patient's identity provided to the doctor separately). Consideration of the public interest balanced with patient privacy should be made as described above (see Section 11.2.7.2 What sort of information can be provided?).

#### 11.2.7.4 How should requests from law enforcement agencies be handled?

Requests should be in writing on letterhead (or electronic equivalent), identifying the requesting officer, providing full address and contact details, and confirming the officer is a representative of a law enforcement agency. The request should also indicate the reason why the law enforcement agency is seeking the information.

Information should not generally be provided by telephone unless in response to a written request or where the requesting officer's identity can be verified.

Requests should be dealt with by the treating health care provider, a senior health professional or a health information manager. When information is provided the service provider should:

- Limit access to information that is directly relevant to the inquiry and clearly necessary for the purpose
- Document all instances of access in the health record
- Where clinical information is necessary, this should be limited to a general outline of the patient's condition and/or injuries.

*Example: A paramedic attends a male patient being held in a police holding cell. After the patient has been examined, the police officer asks questions about the patient relating to their health, and whether in the paramedic's opinion the patient is medically competent to be interviewed. The paramedic should only disclose information relating to the patient which is necessary to enable the police to monitor the condition of the patient, including symptoms which would require the patient to be taken to hospital. Paramedics are not required to discuss other matters relating to the patient, such as whether they are competent to be interviewed.*

### 11.2.7.5 Law enforcement requests in emergency circumstances

Where a health service receives a request for patient information which is urgently required to assist a law enforcement agency with an investigation, and it is impractical or unreasonable to receive this request in writing prior to disclosure, the senior treating clinician may provide limited patient information to the law enforcement agency verbally in person or via telephone.

Prior to release of information, the senior treating clinician must verify the caller's identity. This will require the requesting officer to provide their name, rank and command contact details (or equivalent). The senior treating clinician should then contact the command to confirm the caller's identity and be transferred to that officer.

The scope of the information provided to the law enforcement agency should be consistent with Section 11.2.7.2.

NSW Health has developed a protocol in partnership with NSW Police to assist staff with the sharing of personal health information following a serious motor vehicle accident. This protocol is titled 'NSW Police Force Crash Investigation Injury Assessment Protocol' and is available from the Emergency Care Institute website at: [www.ecinsw.com.au/clinical-support-tools](http://www.ecinsw.com.au/clinical-support-tools)

Other circumstances recognised by the *HRIP Act* which may involve an emergency response are:

1. *'Serious and imminent threat'*  
Disclosure of personal health information is permitted where the health service has reasonable grounds to believe this is necessary to lessen or prevent a serious and imminent threat to the life, health or safety of a person, or a serious threat to public health or public safety (see Section 11.2.3).
2. *'Finding a missing person'*  
Disclosure of personal health information is permitted to ascertain the whereabouts of a missing person reported to the police (see Section 11.2.5)



#### Further guidance

- Section 11.2.7.2 – What sort of information can be provided?
- Section 11.2.3 – To prevent a serious and imminent threat to health or welfare
- Section 11.2.5 – Finding a missing person
- Section 11.3.4 – Reporting “serious criminal offences”
- Section 11.3.6 – Search warrants and subpoenas
- Section 15.2 – Requests from state and federal police

### 11.2.8 Investigative agencies HPP (10)(1)(j) & HPP (11)(1)(k)

A health service may use or disclose personal health information if this is **reasonably necessary** to the complaint handling or investigation functions of an investigative agency.

Under privacy law, an investigative agency is:

- the Ombudsman's Office
- the Independent Commission Against Corruption
- the Police Integrity Commission, the Inspector of the Police Integrity Commission and any staff of the Inspector
- the Health Care Complaints Commission
- the Office of Legal Services Commissioner

In all cases where information is provided to an investigative agency, a health service must:

- as far as reasonably practicable, only respond to written requests which clearly set out the purpose for which the information is required and the provisions of the relevant Act under which the agency seeks the information

- seek and document proof that the person seeking the information is a representative of an appropriate investigative agency
- if in doubt about whether to supply the information, seek advice from the Health Information Service, Privacy Contact Officer or a senior manager
- provide access only to information that is relevant and necessary for the purpose
- document all instances of access in the health record
- where appropriate and practicable, inform the individual to whom the information relates of the access.

### 11.2.9 Disclosure on compassionate grounds HPP 11(1)(g)

A health service may disclose relevant personal health information to an immediate family member, for compassionate reasons. This only arises in relation to a “disclosure”, and will not apply to a use.

This exemption is intended to assist family members with understanding or coming to terms with events that have occurred to their close relative while in the care of the health service, and understanding the circumstances of their death.

An immediate family member includes an individual person who is:

- a parent, child or sibling of the individual, or
- a spouse of the individual, or
- a member of the individual’s household who is a relative of the individual, or
- a person nominated to an organisation by the individual as a person to whom health information relating to the individual may be disclosed.

The exemption is restricted as follows:

- the disclosure must be limited to “what is **reasonably necessary**” for those reasons and
- the individual must be **incapable of giving consent** and
- the disclosure must **not be contrary to any wish the individual** has expressed and has not withdrawn, that the health service is aware of or could reasonably make itself aware of.

Disclosure is limited to a reasonable extent for those compassionate grounds, therefore it is important to make a careful assessment of what part of the patient’s health record is ‘reasonably necessary’ or ‘relevant’ to the family member making the request for access on compassionate grounds. As such, what will be reasonable will vary depending on the particular circumstances. For this reason, it may be appropriate to consult with treating clinical staff to identify the most appropriate types of information for disclosure.

Disclosure on compassionate grounds would not generally cover release of an individual’s entire health record.

An individual who seeks access to the entire health record, should be advised to make a request for access under either the *Health Records and Information Privacy Act* or the *Government Information (Public Access) Act* (see Section 12 Patient access and amendment (HPPs 6, 7 & 8)), or otherwise to issue a subpoena via their legal representative.

Personal health information is covered by privacy principles until 30 years after a person has died. Relevant personal health information may be disclosed at any point in time under compassionate grounds.

If the immediate family member seeking access is under the age of eighteen, the health service must assess whether they have sufficient maturity to receive the information.

*Example: A young person is admitted to hospital unconscious and seriously ill, they have no identification but their mobile telephone address book includes an entry for “Mum at home”. You may contact the mother, and inform her of her son’s admission and general medical state.*

*Example: A person has died suddenly at hospital without indicating his views to staff about how his personal health information should be dealt with. Two of the person's daughters, aged 15 and 17 arrive in a distressed state and wish to know the cause of death. In such case, the information could be shared with them, provided you have assessed they are sufficiently mature to cope.*

*Example: A person with a history of drug use has died in hospital after a long AIDS-related illness. Before dying she has told hospital staff she does not want her family to know the cause of death, as she had kept her drug use a secret. The family arrive and wish to know the cause of death. In such a case, you would be able to give only limited details.*

### 11.2.10 Chaplaincy services

Chaplaincy services are considered an important part of the health support services provided through hospitals and other health services to patients and their families. Chaplaincy services are provided by trained accredited chaplains and trained accredited pastoral care workers (including volunteers) who are required to comply with privacy legislation. A regulation under the *Health Records and Information Privacy Act 2002* allows information to be provided to an accredited chaplain or pastoral care worker where this is a 'reasonable expectation' of the patient. The Privacy Leaflet for Patients informs patients that information about them may be provided to accredited chaplains and pastoral care workers.

Typically, a patient list is provided to accredited chaplains and pastoral care workers (including volunteers). This generally includes patient's name, religious affiliation (if this is provided to the health service) and ward location. Patient lists should only be released to accredited chaplains and pastoral care workers.

Further information about the patient's health care and treatment can also be disclosed to the accredited chaplain or pastoral care worker (including volunteers) involved in the patient's care where this is considered by the treating team to be relevant and appropriate.

With agreement from treating clinical staff, accredited chaplains and pastoral care workers may document significant pastoral and spiritual care intervention in the patient's health record. Further guidance is available in the NSW Health & Civil Chaplaincies Advisory Committee NSW Memorandum of Understanding (PD2011\_004).

The patient may indicate at any time if they do not wish to receive chaplaincy services or if they do not want their information to be made available to accredited chaplains and pastoral care workers (including volunteers). The health service must ensure these views are complied with.



#### Further guidance

- NSW Health & Civil Chaplaincies Advisory Committee NSW Memorandum of Understanding (PD2011\_004)
- NSW Health Chaplaincy Services and Privacy Law (IB2008\_044)
- NSW Health Privacy Leaflet for Patients – see Appendix 5

### 11.3 Use and disclosure authorised by law – HPPs 10(2) and 11(2)

Privacy law recognises that there are many cases where a use or disclosure of information is either allowed by another law, or is required by that law.

Where an agency seeks access pursuant to a lawful authorisation, the health service should:

- request written confirmation from the agency of the request and its legal basis
- provide only the information that is required by the authority, no more and no less
- check whether *Health Records and Medical/Clinical Reports – Charging Policy PD2006\_050* applies to the request



If there are doubts about the relevance of the documents to the purpose described in the law, staff should seek a written confirmation of relevance from the agency exercising their statutory power.

It is necessary to confirm not only that the requesting agency holds the legislative authority to require the information to be provided, but also that the circumstances set out under the relevant legislation apply to the case in question.

There are many such statutes, but some examples of those which commonly apply to a health service are set out below.

### 11.3.1 NSW Ministry of Health Officers and Environmental Health Officers

NSW Ministry of Health officers have powers under the *Health Services Act 1997* and the *Private Health Facilities Act 2007* to obtain information. Inspectors carry authorisations that indicate the nature of their powers and confirm their authority.

The *Poisons and Therapeutic Goods Act 1966*, section 42, allows an officer of the NSW Ministry of Health to be appointed as an 'inspector' with powers to inspect and make copies of records relating to regulated goods, including records containing personal health information.

Environmental Health Officers from Public Health Units have powers under the *Public Health Act* to obtain information. Inspectors carry authorisations that indicate the nature of their powers and confirm their authority.

### 11.3.2 Child protection

The information provided in this section is intended to provide a summary of the key issues relating to the balance between privacy and confidentiality and child protection. Details are provided in the following resources:

- NSW Health Child Protection and Violence Prevention website:  
[www.kidsfamilies.health.nsw.gov.au/current-work/child-protection-and-violence-prevention](http://www.kidsfamilies.health.nsw.gov.au/current-work/child-protection-and-violence-prevention)
- NSW Health Policy Directive: Child Wellbeing and Child Protection Policies and Procedures for NSW Health (PD2013\_007)
- Child Wellbeing and Child Protection - NSW Interagency Guidelines:  
[www.community.nsw.gov.au/kts/guidelines/info\\_exchange/introduction.htm](http://www.community.nsw.gov.au/kts/guidelines/info_exchange/introduction.htm)
- NSW Interagency Keep Them Safe website and Mandatory Reporter Guide:  
[www.keepthemsafe.nsw.gov.au/](http://www.keepthemsafe.nsw.gov.au/)

## Chapter 16A

Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998 (Care Act)* takes precedence over other laws regulating the disclosure of personal information, such as the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

Chapter 16A provides for certain agencies, generally those working with children and families classed as "prescribed bodies" under the *Care Act*, to exchange information with other prescribed bodies relating to a child or young person's safety, welfare or wellbeing in certain circumstances. Under Chapter 16A, information relating to the safety, welfare or wellbeing of a child or young person can be shared between prescribed bodies if the information is necessary to:

- inform any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or well-being of the child or young person or class of children or young persons, or
- manage any risk to the child or young person (or class of children or young or persons) that might arise in the recipient's capacity as an employer.

A prescribed body includes:

- the NSW Police Force
- a NSW government department or NSW public authority, including Family and Community Services (FACS)
- a NSW government school or a NSW registered non-government school
- a NSW TAFE
- a NSW public health organisation (PHO) or a NSW licensed private health facility
- a FACS-accredited or FACS-registered out-of-home care agency
- a FACS-accredited adoption service
- the Family Court of Australia, the Federal Magistrate's Court of Australia, "Centrelink" and the Department of Immigration and Border Protection and
- any other organisation which has direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children.

Further information relating to Chapter 16A, including how to respond to requests and what to do if information is not to be provided, can be found in the relevant NSW Health policies:



#### Further guidance

- PD2013\_007: *Child Wellbeing and Child Protection Policies and Procedures for NSW Health*

#### Section 248

Section 248 of the *Care Act* allows for the exchange of information relating to the safety, welfare and wellbeing of a child or young person between prescribed bodies.

While generally FACS will use Chapter 16A to request information relating to child protection, in some situations FACS will require a prescribed body to provide information to them. If a section 248 request is made for personal health information to be provided, a NSW Health agency must comply with the direction.

#### 11.3.2.1 Reporting children and young people at risk of significant harm

**Under section 24** of the *Care Act*, a person who has reasonable grounds to suspect that a child or young person is at risk of significant harm may make a report to FACS.

**Under section 27** of the *Care Act*, health staff must make child protection reports to FACS where they have reasonable grounds to suspect that a child or young person is at risk of significant harm to FACS, or to the NSW Health Child Wellbeing Unit Under section 27A.

**Under section 25** of the *Care Act*, health staff who have reasonable grounds to suspect, before the birth of a child, that the child may be at risk of significant harm when born may make a pre-natal report to FACS.

Reference to the NSW Mandatory Reporter Guide may assist in ascertaining whether the staff member's child protection concerns meet the threshold of 'risk of significant harm'.

See NSW Mandatory Reporter Guide at: [www.keepthemsafe.nsw.gov.au/](http://www.keepthemsafe.nsw.gov.au/)

#### 11.3.2.2 Protection for mandatory reporters

Section 29 of the *Care Act* provides for the protection of persons who make reports or provide certain information to Family and Community Services (FACS) or to the NSW Health Child Wellbeing Unit.

Where access is being requested to reports made to FACS, the identity of the staff member who made the report, or information from which the identity of that person could be deduced, is privileged and must not be disclosed, except with:

- the consent of the person who made the report,
- the leave of a court or other body before which proceedings relating to the report are conducted.

Where uncertainties exist regarding disclosure, or consideration is being made for the disclosure of the identity of a staff member who has provided information to FACS, advice should be sought from a health information manager, Privacy Contact Officer or legal officer at the health service or NSW Ministry of Health.

### 11.3.2.3 Protection for medical examinations

**Section 173:** Where a medical examination has been conducted in accordance with Section 173 of the *Care Act*, a written report of the examination may be disclosed to the Family and Community Services or the police.

Reports made under section 173 should be provided without charge by health staff. A health practitioner who transmits a report prepared under these circumstances is protected under the *Care Act* from legal action in relation to allegations of professional misconduct and defamation.

### 11.3.2.4 Child Sexual Assault Investigation Kit Records

The Child Sexual Assault Investigation Kit (SAIK) includes consent to disclose SAIK records to FACs and Police for medico-legal purposes. Chapter 16A of the *Care Act* may still provide a basis of sharing this information outside the terms of the consent.

Special sensitivities arise in relation to SAIK records. Particular care should be given to each request for SAIK records to ensure that this information is not disclosed unless for a purpose permitted by the consent given at the time of the administration of the SAIK or where the request meets the requirements of Chapter 16A of the *Care Act*. If it is not clear that the purpose for release is permitted by the consent, further details regarding the purpose of the request should be sought.

### 11.3.2.5 Staff support

It is good practice for health staff to inform their supervisor or manager when they have received a disclosure from a child or young person, of alleged abuse or neglect, to confirm an appropriate action plan or to inform their manager after they have taken relevant steps to respond to the child or young person. Child protection issues are complex and may raise both professional and personal issues for health staff. Informing a supervisor, Child Protection Coordinator or Child Protection Counselling Service should issues arise, helps them to be aware that a staff member may need additional support, information or supervision. Health staff may also contact their Local Health District or Specialty Network for information about contacting the Local Health District Staff Counsellor or Employee Assistance Program (EAP).



#### Further guidance:

- NSW Health Policy Directive: Child Wellbeing and Child Protection Policies and Procedures for NSW Health (PD2013\_007)
- Child Wellbeing and Child Protection – NSW Interagency Guidelines  
[www.community.nsw.gov.au/kts/guidelines/info\\_exchange/introduction.htm](http://www.community.nsw.gov.au/kts/guidelines/info_exchange/introduction.htm)
- NSW Interagency Keep Them Safe website and Mandatory Reporter Guide  
[www.keepthemsafe.nsw.gov.au/](http://www.keepthemsafe.nsw.gov.au/)
- NSW Health Child Protection and Violence Prevention website:  
[www.kidsfamilies.health.nsw.gov.au/current-work/child-protection-and-violence-prevention](http://www.kidsfamilies.health.nsw.gov.au/current-work/child-protection-and-violence-prevention)

Contact:

- **NSW Kids and Families on telephone (02) 9391 9000**  
[www.kidsfamilies.health.nsw.gov.au/](http://www.kidsfamilies.health.nsw.gov.au/)

- **NSW Health Child Wellbeing Unit on telephone 1300 480 420**

For support and assistance in determining the level of risk of harm and how to respond to the needs of vulnerable children and young people.

### 11.3.3 Access to health records of correctional centre inmates

Sharing of information between Justice Health & Forensic Mental Health Network and the Corrective Services NSW is detailed in 'Guidelines on the use and disclosure of inmate/patient medical records and other health information'.

The staff of Justice Health & Forensic Mental Health Network may disclose information relating to the medical history of an inmate to Corrective Services NSW, or other correctional facilities, to investigate an incident or assault involving that inmate. Requests should be in writing indicating the basis for disclosure. Consent from the inmate/patient must be obtained, unless other lawful disclosure applies (for example, risk of harm, see Section 11.2.3, or law enforcement, see Section 11.2.7).



#### Further guidance

- 'Guidelines on the use and disclosure of inmate/patient medical records and other health information' available at:  
[www.justicehealth.nsw.gov.au/publications/guidelines-disclosure-medical-records.pdf](http://www.justicehealth.nsw.gov.au/publications/guidelines-disclosure-medical-records.pdf)
- IB2010\_044: *Mental Health Information and the Health Records and Information Privacy Act 2002*

### 11.3.4 Reporting "serious criminal offences"

Section 316 of the *Crimes Act 1900* requires a person to consider whether the information they have will be of 'material assistance' to securing the apprehension or conviction of an offender. If it is, they are obliged to notify police. Failure to do so could lead to a conviction and the imposition of a penalty of up to two years imprisonment, if there is no "reasonable excuse" for this failure.

A 'serious criminal offence' is defined as an offence which attracts a penalty of five years imprisonment or more. Health staff should be aware that this covers offences such as drug trafficking, serious assaults, sexual assaults, murder and manslaughter. It does not cover minor possession offences or any offences under public health legislation.

The Regulations under the *Crimes Act* also provide that prosecution for an offence under this law will not be commenced against a person without the approval of the Attorney General if the information was obtained in the course of practising as a:

- health practitioner,
- psychologist,
- nurse,
- social worker, including, a support worker for victims of crime, and a counsellor who treats persons for emotional or psychological conditions suffered by them,
- researcher for professional or academic purposes.

The aim of the provision is to protect health care providers who, in good faith and on reasonable grounds, do not disclose this information to police.



#### Further guidance

- Section 11.2.7 Disclosure of information to law enforcement agencies, including police
- NSW Health Policy Directive: Domestic violence – identifying and responding (PD2006\_084)
- Interagency guidelines for responding to adult victims of sexual assault, issued by NSW Health, the NSW Police Force and the Director of Public Prosecutions. The guidelines are available to NSW Health staff by contacting their local Sexual Assault Service.
- Interagency guidelines for responding to domestic violence: It Stops Here: Safer Pathway, and Domestic Violence Information Sharing Protocol, available at:  
[www.domesticviolence.nsw.gov.au/services](http://www.domesticviolence.nsw.gov.au/services)

### 11.3.5 Coroner

The *Coroners Act 2009* requires notification to the Coroner of deaths occurring under certain conditions. The Coroner will require original health records. The health service should take care to ensure a full copy of all documents is retained by the health service. This is important in the event the death occurs outside of normal business hours and clinical staff are requested by police, on behalf of the Coroner, to provide the patient health records rather than the Health Information Department, which has strict protocols around disclosure.

Health records required for postmortem examinations must be provided to the Coroner, in order that the pathologist or medical officer conducting the postmortem may access the health record. When health records are tendered to the Coroner, the treating health practitioner should be notified.

Where a request or an order is made by the Coroner, or the police for coronial purposes, it should be received on letterhead (or electronic equivalent), with reference to section 53 of *the Coroners Act*, and detailing which information is required.



#### Further guidance

- PD2010\_054: Coroners Cases and the Coroners Act 2009

### 11.3.6 Search warrants and subpoenas

#### *Search warrants*

Compliance with a search warrant is required by law and record keepers should inform their immediate supervisor of any official demand for such access to information. Where possible, a copy of the record should be made and retained by the health service.

#### *Subpoenas*

Compliance with a subpoena is required by law. The return date should be noted on receipt and the subpoena dealt with promptly by the officer designated to co-ordinate responses to subpoenas.

Where a patient whose health record has been subpoenaed is not named as a party to the proceedings, he or she should be notified by the health service that the subpoena has been received and advised of the return date.

A subpoena may be challenged on a number of grounds including:

- abuse of process
- where the terms of a subpoena are excessively wide and imprecise, and to comply with them would be onerous
- public interest immunity
- legal professional privilege
- sexual assault communications privilege.

If a staff member has concerns about the scope of a subpoena, or considers it should be challenged, he or she should consult their immediate manager and obtain advice from the health service's solicitors if appropriate.

Care should be taken that documents outside the scope of the subpoena are not provided by referring to the subpoena's schedule.

If acceptable, copies should be provided and the original health record retained by the health service. Where originals are required, the health records should be forwarded to the Court and a complete copy kept by the health service.

Documents should be delivered to the Registrar or Clerk of the Court in question by secure means, i.e. courier delivery or registered post. A receipt signed by the official receiving the health record should be obtained which specifies the health record number, date received and name of the Court.



#### **Further guidance**

- PD2010\_065: Subpoenas

### **11.3.7 Health Care Complaints Commission**

#### ***11.3.7.1 Powers to enter premises***

Authorised officers of the Health Care Complaints Commission (HCCC) have powers of entry that include the power to inspect, copy or remove health records and to require a person to provide information.

They carry authorisations that indicate the nature of their powers and confirm their authority. HCCC authorised officers can only exercise these powers with consent from the owner or occupier of the premises or with a search warrant.

#### ***11.3.7.2 Powers to obtain documents***

Under sections 21A and 34A of the *Health Care Complaints Act 1993*, the Health Care Complaints Commission also has powers to require the production of documents, in order to assist it in the assessment of a complaint, or as part of its investigations. Where the Commission exercises this power, it should provide a written order for the documents, citing the relevant provisions.

### **11.3.8 The Ombudsman**

The Ombudsman is empowered to require health authorities to supply information where a formal investigation is being conducted under the *Ombudsman's Act 1974*.

### **11.3.9 Official visitors**

Official visitors are appointed under the *NSW Mental Health Act 2007* to inspect declared mental health facilities.

Under Section 132 of the Act, official visitors must be provided with access to health records relevant to the care of patients.

### **11.3.10 Child Death Review Team**

Chapter 9A of the *Coroner's Act 2009* provides for a Domestic Violence Death Review Team, which includes a Child Death Review Team.

The NSW Child Death Review Team and the Ombudsman review child deaths with the purpose of preventing and reducing child deaths.

Under Section 34K of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, the Child Death Review Team has powers to obtain unrestricted access to relevant health records and to obtain copies on request.

### 11.3.11 Workcover

Relevant sections of the *Work Health and Safety Act 2011*, allow inspectors from Workcover NSW (as the Regulator for the purposes of the Act) to require production of material relevant to the investigation of an alleged or possible breach of the Act. Such a request must usually be made either in writing stating the reasons why access is being sought, or a formal notice should be issued. Sections of the *Work Health and Safety Act* relevant to the production or inspection of documents are:

- section 155 Powers of regulator to obtain information
- section 165 General Powers on entry (of an Inspector)
- section 171 Power to require production of documents and answers to questions
- section 174 Powers to copy and retain documents

### 11.3.12 Commonwealth Agencies

#### 11.3.12.1 Commonwealth Department of Family and Community Services

The Commonwealth Department of Family and Community Services has powers under the *Social Security (Administration) Act 1999 (Commonwealth)* to access information relating to pensions, benefits and allowances. The request must be in writing and notice must be given under Sections 192, 196 and 197 of the Act.

#### 11.3.12.2 Veterans' Affairs

Under Section 128 of the *Veterans' Entitlement Act*, the health service is required to release to the Department of Veterans' Affairs (DVA) relevant information relating to treatment received at any public health facility by repatriation beneficiaries.

Disclosure of patient information for purposes other than funding are subject to the exemptions listed in Section 11.2.

Deaths of repatriation patients must also be reported to the Department of Veterans' Affairs.

Disclosure of the names of DVA patients for the purpose of visits by voluntary groups, such as ex-service organisations, is only permitted with patient consent. Pro forma consent forms and information leaflets are available from the health service's DVA representative, or by contacting the Government Relations Branch, Ministry of Health.

#### 11.3.12.3 Immigration and border protection

The Commonwealth Department of Immigration and Border Protection has powers under section 18 of the *Migration Act 1958 (Commonwealth)* to obtain information about illegal non-citizens.

The power allows the Department of Immigration and Border Protection to require a health service to produce information believed to be relevant to ascertaining the identity or whereabouts of a person believed to be an illegal non-citizen. The power must be exercised by service of a notice in writing.

### 11.3.13 Statutory reporting requirements

The public health system is required by legislation to notify authorised agencies of certain types of personal health information.

#### *Public Health Act 2010*

##### **The following must be reported to the NSW Ministry of Health:**

- Scheduled Medical Conditions
- Inpatient statistics
- Maternal and perinatal data for Perinatal Data Collection
- Cancer cases (through the NSW Cancer Registry)
- Register for Congenital Conditions



##### **Further guidance**

- Section 15.9.6 Managing public health risks
- PD2005\_210: Inpatient Statistics Collection (ISC)
- PD2009\_012: Cancer Registry – Notifying Cancer Cases to the NSW Central Cancer Registry
- PD2012\_055: Congenital Conditions Register – Reporting Requirements
- IB2012\_011: Notification of Infectious Diseases under the NSW *Public Health Act*
- PD2012\_047: Notifiable Conditions Data Security and Confidentiality

#### *Health Services Act 1997*

- Chief Executives of health services have an obligation to report suspected unsatisfactory conduct or suspected professional misconduct of staff members or contracted service providers (VMOs) to the relevant health professional registration board.

#### *Births, Deaths and Marriages Registration Act 1995*

- Perinatal deaths must be reported to the Principal Registrar.

#### *Health Services Act 1997, Private Hospitals and Day Procedure Centres Act 1988*

- Adverse drug reactions must be reported to the Australian Drug Evaluation Committee at the Ministry of Health.

#### *Home and Community Care Act 1985 (Commonwealth)*

The Commonwealth Home and Community Care (HACC) Program provides services that support older people to stay at home and be more independent in the community. The *Home and Community Care Act* requires HACC service providers, which may include some NSW Health agencies, to operate within the reporting framework set out in their Aged Care Funding Agreement. This agreement requires the reporting of demographic and health details relating to individuals receiving HACC services.



##### **Further guidance**

- PD2008\_050: Home and Community Care Minimum Data Set Version 2 – Collection & Reporting Requirements



### 11.3.14 *Poisons and Therapeutic Goods Act 1966*

The NSW Ministry of Health collects and maintains personal health information as required under the *Poisons and Therapeutic Goods Act 1966*.

*The Poisons and Therapeutic Goods Act* provides for the collection, use and disclosure of personal health information as follows:

- for the purpose of administering authorisations to prescribe drugs of addiction
- to the Medical Committee and its subcommittees for the purpose of advising on applications to prescribe drugs of addiction
- under the provisions of Section 43 of the Act when auditing and investigating individual health practitioners and licensed or authorised persons or organisations to ascertain compliance with the Act or Regulation.



#### Further guidance

- NSW Health Pharmaceutical Services Unit website at: [www.health.nsw.gov.au/pharmaceutical](http://www.health.nsw.gov.au/pharmaceutical)

### 11.3.15 Information required by the Minister or Premier

NSW privacy laws also recognise that from time to time the executive arm of government (i.e. the Minister for Health and the Premier) may require access to and use of personal health information.

HPPs 10(4) and 11(4) therefore provide that nothing in the use and disclosure restrictions prevents the disclosure of personal health information by a public sector agency:

- to another public sector agency under the administration of the same Minister if the disclosure is for the purposes of informing that Minister about any matter within that administration or
- to any public sector agency under the administration of the Premier, if the disclosure is for the purposes of informing the Premier about any matter.

#### 11.3.15.1 Ministerial correspondence and briefings

NSW Health agencies are required to prepare correspondence and briefings for, and on behalf of, the Minister for Health, Minister for Mental Health and the NSW Premier as requested. Such requests may seek to include personal health information about the correspondent, or a person they claim to represent.

When responding to correspondence, staff should take care not to disclose personal health information other than that which has been provided by the correspondent, or with the consent of the patient, or as is necessary to appropriately address the concerns raised and provide relevant background information to the Minister.

If the correspondent is seeking to obtain access to or a copy of their own health record, or that of a friend or relative, they should be referred to the Health Information Service, or equivalent, for the health service where the patient received health services (see also Section 12 Patient access and amendment).

