The Shopfront

YOUTH LEGAL CENTRE

Confidentiality and Privacy for Youth Workers

1 Introduction

1.1 The principle of confidentiality

The concept of confidentiality is well known to most community workers, health professionals and counsellors. In general, your clients need to know that they can trust you not to pass on sensitive information without their consent.

Confidentiality clauses may be contained in a worker's employment contract, in a professional code of ethics, or in an agreement between the worker and a client. In some situations, confidentiality obligations are also spelt out by legislation.

If you breach confidentiality, you may be subject to disciplinary proceedings at the hands of your employer or professional association. It is also possible (albeit unlikely) that your client may sue you if they have suffered harm as a result of your breach of confidentiality. In some situations, breach of confidentiality may be a criminal offence.

1.2 The law

There is no one law that spells out *all* your confidentiality obligations. Different laws affect different aspects of your confidential relationship with your clients, including:

(a) **requiring you to keep certain things confidential** (e.g. section 56 of the *Public Health Act*, which makes unauthorised disclosure of a person's HIV/AIDS status an offence, or the Commonwealth or NSW privacy legislation);

(b) **saying you do not have to disclose certain information if it is confidential** (e.g. the sexual assault communications privilege and professional confidential relationship privilege in the *Evidence Act* and the *Criminal Procedure Act*);

(c) **allowing you to disclose information which would otherwise be confidential** (e.g. the voluntary reporting and information exchange provisions in the *Children and Young Persons (Care and Protection) Act*);

(d) **requiring you to disclose certain information even if you believe it to be confidential** (e.g. the mandatory reporting provisions of the *Children and Young Persons (Care and Protection) Act*)).

This document explains the laws which are most likely to affect you when working with young people.

2 Privacy legislation

Many individuals and organisations providing services to young people will be affected by Commonwealth or State privacy legislation. These laws regulate the collection, use and disclosure of clients' personal information.

2.1 The Commonwealth *Privacy Act*

(a) Application to non-government organisations and businesses

The Commonwealth *Privacy Act* does not just apply to government agencies. It also applies to:

- businesses and non-government organisations with an annual turnover of $3 million or more;
- private health service providers and organisations (including counsellors, GPs and private hospitals);
- organisations providing any service under a Commonwealth government contract (e.g. Job Network);
- organisations that trade in personal information for a benefit, service or advantage (such as direct marketers).

The Act does not cover some acts and practices, e.g. employers' use of employee records for employment purposes; the use of personal information by media organisations "in the course of journalism"; political acts and practices by political parties.

The law requires organisations to follow the *Australian Privacy Principles* (APPs), which can be found at https://www.oaic.gov.au/individuals/privacy-fact-sheets/general/privacy-fact-sheet-17-australian-privacy-principles.

(b) Collection of personal information

Organisations can only collect personal information that is necessary for them to perform their function, and they can only collect information in a lawful and fair way.

The individual must be informed of the purposes for which the information is being collected, what law requires the information to be collected, and any consequences if the individual does not allow the organisation to collect the information. If the information is being collected from someone other than the individual, the individual must also be notified.

(c) Non-disclosure of personal information

In general, personal information about clients may not be disclosed to other people or organisations without the client's consent.

There are various exceptions to this. These include where the disclosure is required by law (e.g. a subpoena or court order, or a requirement to report a child at risk), or the organisation believes it is necessary for law enforcement or safety (e.g. telling the police about a client's criminal activities).

(d) Record keeping and storage

Organisations are required to keep client records secure, to minimise the risk of misuse and loss and unauthorised access, modification or disclosure.

Personal information about clients should be destroyed or "de-identified" if it is no longer needed. However, destruction of records should be done with caution - there may be other laws which require you to keep records for certain periods of time.

(e) Allowing clients to access their files

Clients must be allowed reasonable access to any personal information held by an organisation.

Information held by a government agency can usually be accessed through a Freedom of Information (FOI) application.

To access information from a private sector organisation or health service provider that is covered by the APPs, a request must be made to the organisation itself, which may have its own forms or procedures.

In some circumstances, a client can be denied access to their records - for example, if access would pose a serious threat to the person's safety, or if it would unreasonably interfere with the privacy of other people. Access can also be denied if providing access would be likely to prejudice the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of its orders.

2.2 New South Wales *Privacy and Personal Information Protection Act*

(a) Application

The *Privacy and Personal Information Protection Act* 1998 (NSW) deals specifically with NSW public sector agencies. The term 'public sector agency' includes most State government departments and statutory authorities, all local and county councils in NSW, public hospitals, universities and state schools.

Some private organisations that receive state funding are also categorised as government agencies for the purposes of the Act. For example, refuges funded by Family and Community Services are regulated by the Act.

(b) Information protection principles

The Act introduced a set of privacy standards which regulate the way in which NSW public sector agencies should deal with 'personal information'. Personal information includes any information about an individual or material that is reasonably capable of identifying a person and may extend to genetic material, photographs and video recordings.

The Information Protection Principles in the Act are closely modelled on the Australian Privacy Principles in the Federal *Privacy Act*, set out above. There are 12 Information Protection Principles which are applicable to NSW public sector agencies. See https://www.ipc.nsw.gov.au/ for the principles.

2.3 New South Wales *Health Records and Information Privacy Act*

The handling of health information in NSW is governed by the *Health Records and Information Privacy Act* 2002 (NSW) (HRIPA). HRIPA applies to both NSW public and private sector organisations.

'Health information' is a specific type of 'personal information'. Health information includes personal information that is information or an opinion about the physical or mental health or a disability of an individual. It also includes personal information that is information or an opinion about an individual's express wishes about the future provision of health services to him or her, or a health service provided, or to be provided to an individual.

The 15 health privacy principles (HPPs) are the key to HRIPA. They describe what organisations must do when they collect, hold, use and disclose health information. However, in some cases, organisations do not have to follow one or more of the HPPs. For more information see https://www.ipc.nsw.gov.au/.

3 Disclosure of a person's HIV/AIDS status

3.1 Category 5 medical condition

The *Public Health Act* 2010 (NSW) lists several categories of medical conditions, and sets out who may disclose information about them and in what circumstances. A "Category 5 medical condition" means Human Immunodeficiency Virus (HIV) infection.

3.2 Unauthorised disclosure an offence

Section 56 of the *Public Health Act* 2010 (NSW) provides that a person who, in the course of **providing a service**, acquires information that another person:

(a) has been, is to be, or is required to be, tested for a Category 5 medical condition, or

(b) has, or has had, a Category 5 medical condition,

must take all reasonable steps to prevent disclosure of the information to another person.

3.3 When information may be disclosed

Section 56 of the *Public Health Act* 2010 (NSW) provides that information about a person's HIV status **may be disclosed**:

(a) with the person's consent, or

(b) to a person who is involved in the provision of care to, or treatment or counselling to the person concerned, or

(c) to the secretary, if a person has reasonable grounds to suspect that failure to disclose the information would be likely to be a risk to public health, or

(d) in connection with the administration of the Public Health Act or another Act, or

(e) for the purposes of any legal proceedings arising out of the Public Health Act or the regulations, or

(f) in accordance with a requirement imposed under the Ombudsman Act, or

(g) in such other circumstances as may be prescribed by the regulations.

Therefore it is lawful to disclose information if it is necessary for the provision of the service (e.g. a lab technician would be authorised to give a person's HIV test results to their treating doctor).

If you know that a person is HIV positive, and are concerned that they are behaving in a way that puts other people at risk (e.g. unsafe sex), the *Public Health Regulations* allow you to notify the Director-General of the Department of Health.

4 Reporting of children and young people at risk of significant harm

4.1 Children and young people at risk

Sections 23-29A of the NSW *Children and Young Persons (Care and Protection) Act* deal with reporting of children and young people at risk.

4.2 Mandatory reporting

Section 27 requires certain categories of people to make a report to the Department of Family and Community Services if they believe on reasonable grounds that a **child under 16 is at risk of significant harm**.

A child is at risk of significant harm if there are current concerns for the child's welfare, safety or well-being due to factors such as abuse, neglect or domestic violence.

The mandatory reporting requirement extends to **paid workers** who deliver certain services to children (e.g. health care, welfare, education, residential services, law enforcement), and people involved in **management** of such services (even if they are volunteers).

Volunteers are not mandatory reporters (unless they are in a management position in a voluntary capacity), but will obviously feel a need to report in some cases (either from an ethical obligation or because of a policy that exists within their organisation).

4.3 Voluntary reporting

The Act also states that **anyone *may*** report to Family and Community Services if they believe on reasonable grounds that a young person under 18 is at risk of significant harm. Voluntary reports may be made anonymously.

4.4 Protection of people who report

Reports made to Family and Community Services (whether voluntary or mandatory) are treated confidentially. However, recent amendments allow the identity of the reporter to be disclosed to law enforcement agencies involved in investigating a serious offence against a child or young person.

People who do report children at risk under the *Children and Young Persons (Care and Protection) Act* are protected by the Act from actions for defamation, professional misconduct, malicious prosecution, etc, as long as the report is made in good faith. In most situations, the report or its contents cannot be used as evidence in any proceedings before a court, tribunal or committee.

While the Act does not specifically exempt a reporter from being sued for breach of confidentiality, the inadmissibility of evidence regarding the report would make it difficult for anyone to sue a reporter for this.

4.5 Further information

Please see our separate fact sheet on *Children and young people at risk – reporting and exchange of information*.

5 Exchange of information between agencies working with children and young people

5.1 Exchange of information

Chapter 16A of the *Children and Young Persons (Care and Protection) Act* provides for government agencies and certain non-government organisations to **exchange information** relating to the well-being of a child (under 16) or young person (16 or 17). It also requires these agencies and organisations to take reasonable steps to co-ordinate decision-making and service delivery regarding children or young people.

Chapter 16A applies to "**prescribed bodies**" under the Act. This includes some courts and government departments, fostering and adoption agencies, and any organisation providing health care, welfare, education, child care, residential or law enforcement services to children.

A prescribed body:

- **must** pass on information if requested by another prescribed body
- **may** provide information to another prescribed body, even if not requested to

if the agency passing on the information **reasonably believes it would assist** the other agency:

- to make a decision or provide a service relating to the young person's safety, well-being or welfare; or
- to manage any potential risk to the young person that might arise in the agency's capacity as an employer or designated agency.

This information can be provided even though the agency would normally owe the client a duty of confidentiality.

However, a prescribed body **may refuse to provide information** in some circumstances, for example: if it would prejudice the conduct of an investigation or inquiry, endanger a person's life or physical safety, or would not be in the public interest.

5.2 Information requests from Family and Community Services

Under section 248 of the *Children and Young Persons (Care and Protection) Act*, Family and Community Services **may direct a "prescribed body" to furnish information** about the safety, welfare and well-being of a particular child or young person (or a class of children or young persons).

Unlike Chapter 16A, section 248 **does not allow a prescribed body to refuse to provide this information**. It overrides any confidentiality obligations that would otherwise exist.

6 Subpoenas and privilege

6.1 Subpoenas

A **subpoena** is a document requiring you to go to court to be a witness and/or to produce certain documents to the court. Your case notes, files, records, etc may be subpoenaed in a variety of cases, such as care applications, criminal matters involving one of your clients (either as an offender or a victim), or cases where a client is suing you or someone else.

A subpoena is not issued by a judge or magistrate, but is issued by a party to a court case (or more commonly by their lawyers). However, it is similar to a court order in that it must be obeyed unless the court directs otherwise.

Refusal to answer a subpoena can have serious consequences. The court may even issue a warrant for your arrest if you fail to comply with a subpoena. Failure to answer questions or to disclose certain material in court may lead to a prosecution for contempt of court. Penalties can include imprisonment.

Subpoenaed documents do not automatically become evidence in the court case. But even if the documents are not used as evidence, the information obtained from them can potentially cause harm.

6.2 Privilege

The NSW *Evidence Act* and the *Criminal Procedure Act* set out several categories of "**privilege**", which restricts confidential material from being used as evidence or made available to lawyers in a court case.

The most well-known of these is "**legal professional privilege**", which protects communications between a lawyer and a client which were made confidentially in the context of obtaining or giving legal advice. Legal professional privilege has existed for almost as long as our legal system.

6.3 Sexual assault and professional confidential relationship privilege

In 1998 the law was amended to include two new, and very important, types of privilege: "**professional confidential relationship privilege**" and "**sexual assault communications privilege**".

These privileges **allow the court to exclude evidence which would disclose confidential communications** made in the course of a professional, or sexual assault

counselling, relationship. “Professional” is not defined, but it would presumably include a youth worker, health worker, social worker or counsellor.

The **sexual assault communications privilege** is set out in the *Criminal Procedure Act*. It not only restricts the use of material as evidence in court; it also places restrictions on who can have access to subpoenaed documents. The onus is on the defendant to show why they should have access to the victim’s counselling notes.

The **professional confidential relationship privilege** is in the *Evidence Act*. Under this category of privilege, it is more difficult to get material excluded from evidence, and you can’t always prevent it from being produced on subpoena.

If your files are subpoenaed and you believe that they may be protected by privilege, it is a good idea to get legal advice. **The fact that certain documents may be privileged does not mean you do not have to produce them**. You should produce them to the court in a sealed envelope which is clearly marked that you believe the material is covered by privilege. If possible, you or a lawyer should go to court and be prepared to argue why the documents are privileged.

Finally, remember that, even though the **documents** might belong to the service provider, **the privilege belongs to the client**. You should always attempt to contact your client to discuss the subpoena with them. If the client consents to disclosure, you may disclose the information.

For more information see the *Subpoena Survival Guide* at: http://lacextra.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/753.pdf.

7 Reporting (or concealing) criminal activity

7.1 Concealing a serious offence: section 316 of the *Crimes Act*

Section 316 of the *Crimes Act* (NSW) says that an adult:

(a) who knows or believes that a serious indictable offence has been committed by another person; and

(b) who knows or believes that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence; and

(c) who fails, without reasonable excuse, to bring this to the attention of the police or other appropriate authority;

is guilty of an offence. The maximum penalty depends on the seriousness of the offence that is being concealed, and could be up to 5 years' imprisonment (or 7 years if a person conceals the offence in return for some personal benefit such as money).

7.2 Definition of “serious indictable offence”

A “**serious indictable offence**” is defined in section 4 of the *Crimes Act* as an offence punishable by imprisonment for life or for a term of 5 years or more.

This would include offences such as stealing (even something of very low value such as a chocolate bar!), property damage, assault occasioning actual bodily harm, sexual assault, or supplying a prohibited drug.

It would not include offences like common assault, offensive language, most traffic offences, or possession or self-administration of a drug.

7.3 Reasonable excuse

The *Crimes Act* does not say what amounts to a "reasonable excuse", but it would probably include the need to protect trust and confidentiality with your client (and, by extension, your reputation among other potential clients as someone who won't dob on them).

7.4 Special provisions for professionals and researchers

It is very unlikely that a youth worker, counsellor, etc would be charged with this sort of offence.

The law recognises the position of professionals by requiring the approval of the Director of Public Prosecutions (DPP) before prosecuting someone whose knowledge or information was obtained "in the course of practising or following a **profession, calling or vocation** prescribed by regulations for the purpose of this section".

The professions prescribed by the regulations are: **legal** practitioners, **medical** practitioners, **psychologists**, **nurses**, **social workers** (including **support workers for victims of crime** and **counsellors** treating people for emotional or psychological conditions), members of the **clergy** of any church or religious denomination, **researchers** for professional or academic purposes, and (as of 9 November 2007) **mediators** and **arbitrators**.

Although youth workers and community workers are not specifically mentioned, they would arguably come within the definition of "social worker".

7.5 Concealing a child abuse offence

A new section 316A was introduced into the NSW Crimes Act in 2018. From 31 August 2018, it is an office to fail to report information about a "child abuse offence" to the police without a reasonable excuse. This is very similar to the offence under section 316.

The definition of "child abuse offence" is in section 316A(9) and includes a range of offences, including sexual offences and physical assaults on children. It includes some offences which have maximum penalties of less than 5 years imprisonment (e.g. offences involving "sexual acts" which used to be known as "acts of indecency") and therefore would not be "serious indictable offences" under section 316.

Maximum penalties are similar to those under section 316.

As with section 316, if you obtain the information in connection with practising a "profession, calling or vocation" prescribed by the regulations, you cannot be prosecuted for an offence under section 316A without the consent of the DPP.

Unlike section 316, there is a list of things that amount to a "reasonable excuse" under section 316A. These include, but are not limited to, situations where:

- you believe on reasonable grounds that the information is already known to police, or
- you have already reported it to FaCS or the Ombudsman, or believe on reasonable grounds that someone else has done so, or
- you have reasonable grounds to fear for the safety of the victim or any other person (other than the offender) if the information were reported to police, or
- you were under 18 when you obtained the information, or
- the alleged victim was already an adult by the time you obtained the information, and you believe on reasonable grounds that (s)he does not wish the information to be reported to police.

8 How you may become complicit in a crime

8.1 Accessory after the fact

In some cases, a person who knows about another person's crime may be charged as an **accessory after the fact.**

To be an accessory after the fact, you must not only know that someone has committed a crime, but you must do something to help them escape justice (e.g. helping them get rid of stolen goods, or giving them a place to hide from police).

8.2 Hindering police

Police who are investigating a crime may come to you seeking information about a client's whereabouts, activities on a particular day, etc. Some police officers may threaten to charge you with hindering police if you refuse to provide information.

However, **mere failure to provide information does not amount to hindering police**.

To be guilty of hindering police, you would usually need to do something that actually obstructs them, such as destroying evidence or refusing to let them in when they have a valid search warrant.

It is possible that providing false information (with the intention of deceiving the police and getting them off the trail) may amount to hindering.

8.3 Harbouring an escapee from a prison or detention centre

If you knowingly provide an escapee with assistance (such as food and shelter) you may be guilty of **harbouring,** which carries a maximum penalty of 3 years' imprisonment.

Letting them come into your centre for a chat (especially if it involves a discussion about handing themselves in to the police) would not amount to harbouring.

8.4 Warrants, breach of bail, etc

If you know that someone has outstanding warrants, has breached their bail conditions, has failed to appear at court, or is wanted for police questioning, **you don't have to tell the police**.

However, if the person is wanted for a serious matter, you may be justified in breaking confidentiality and choosing to notify the police.

9 Planned or threatened criminal activity

There is no legislation that says you must disclose information about an **intended crime**. However, you should bear in mind the following:

9.1 Accessory before the fact

If someone tells you about a crime they are about to commit, your assistance may lead to you being charged as an **accessory before the fact**. Mere knowledge and silence is not generally enough to be assistance.

9.2 Is there a duty to warn or protect potential victims?

If you believe a client is about to commit a crime, you may be justified in breaching confidentiality to try to prevent the crime from being committed. However, there is no Australian law which imposes any duty to do this.

The American case of *Tarasoff* was decided by the Supreme Court of California in 1976. A male student told a university counsellor that he planning to kill a particular young woman. The counsellor was concerned about this threat and contacted university

security, but did not warn the young woman directly. The student carried out his threat, and the victim's family sued the counsellor for failing to warn or protect her. The court decided that the psychologist not only had a *right* to breach his client's confidentiality, but he had a *duty* to do so, and should have taken further steps to warn the victim that her life was at risk.

If a similar case was heard in Australia, it is unlikely that a court would impose a similar duty on a counsellor to warn potential victims of a client's threats. However, if you are seriously concerned about threats made by a client, it is clear that you would be justified in breaching confidentiality in the interests of protecting the potential victim.

10 Threats of suicide or self-harm

In some cases you may have a duty of care towards your client, to take reasonable steps to prevent them from suffering harm. Your duty will depend on the type of service you work for, and the age and mental capacity of the client.

A youth worker or counsellor is not expected to provide 24-hour supervision in case the client does something dangerous. However, if you work at a residential service for younger children, or a psychiatric hospital, you may be required to do more to supervise the client or control their behaviour.

If a client threatens self-harm or suicide, and you wish to notify someone such as a mental health crisis team, you would almost certainly have a lawful excuse to breach your client's confidentiality.

11 Conclusion: to tell or not to tell?

In most cases, the law does not *compel* you to disclose a client's past or intended criminal activity, threats of self-harm, or medical conditions that may place others at risk. However, if you feel there is a risk to the client, another person or to public health and safety, the law will usually *allow* you to disclose information without getting into trouble for breaching confidentiality.

Every situation involves balancing competing interests and duties. In some cases the interests of justice (or of other clients) may be more important than the need to maintain confidentiality. In other cases, breaching confidentiality could have such a detrimental effect on your relationship with the client that you would be justified in not disclosing.

It is always a good idea to seek guidance from your colleagues and management and, if possible, obtain legal advice.

Updated February 2019

The Shopfront Youth Legal Centre
356 Victoria Street, Darlinghurst NSW 2010
Tel: 02 9322 4808
Fax: 02 9331 3287
www.theshopfront.org
shopfront@theshopfront.org

The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.

This document was last updated in February 2019 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

This document provides a summary only of the subject matter covered, without the assumption of a duty of care. It should not be relied on as a substitute for legal or other professional advice.