

HEALTH CARE COMPLAINTS COMMISSION PROTOCOL FOR DISCLOSING INFORMATION UNDER SECTION 99B OF THE *HEALTH CARE COMPLAINTS ACT 1993*



- memoranda.

The information collected/held by the Commission contains private health information and personal information, as well as information regarding the standards of health services provided and the fitness and suitability to practice of health practitioners.

Introduction

The Health Care Complaints Commission acts to protect public health and safety by dealing with complaints about health service providers in NSW. The Commission is an independent body that was established under the *Health Care Complaints Act 1993* (“the Act”). The Act defines the scope of the Commission's work, which is to:

- receive and assess complaints relating to health service providers in NSW
- resolve or assist in the resolution of complaints
- investigate serious complaints that raise questions of public health and safety
- prosecute serious complaints.

Information held

The Commission collects a range of information when handling complaints. This information is obtained during the assessment, resolution, investigation and/or prosecution of complaints, and can include:

- statements of witnesses
- expert reports
- clinical and other records
- information obtained under compulsory notices
- responses from health service providers (either individual practitioners or health organisations)
- advice from the Commission's internal medical and nursing advisors
- file notes

Section 99A

Under section 99A of the Act, a person cannot disclose information obtained in exercising a function under the Act unless it is: with the consent of the person to whom the information relates; in connection with the execution and administration of the Act; for the purposes of any legal proceedings arising under the Act; or with other lawful excuse.

The Commission cannot be compelled in any legal proceedings to provide information or documents obtained in exercising a function under the Act, however, there are some specific exceptions allowing information to be provided to bodies such as Commissions of Inquiry and the Independent Commission Against Corruption.

Section 99A provides the basis for the security of information held by the Commission. Sensitive information is protected to ensure the Commission's ongoing ability to investigate complaints and the privacy of persons. Information held is restricted where its release may affect the Commission's ability to effectively carry out its role in protecting public health and safety or cause harm or detriment to a person or persons.

HEALTH CARE COMPLAINTS COMMISSION

Section 99B disclosure

Section 99B

Under section 99B of the Act, the Commission, at its discretion, may disclose information obtained in exercising a function under the Act to courts and various agencies. It may also provide information to a health service provider that is the subject of an investigation under the Act or a client of a health service provider that has been the subject of an investigation under the Act, but only to the extent the information relates to that client.

The Commission can disclose information only if it considers the public interest in disclosing the information outweighs the public interest in protecting the confidentiality of the information and the privacy of any person to whom the information relates. In making this assessment, the Commission must have regard to the protection of the health and safety of the public as the paramount consideration.

Public interest considerations

Protection of privacy and confidentiality

When dealing with complaints the Commission collects/obtains/holds confidential information. In order to effectively manage complaints the Commission needs information from people who would not be prepared to speak frankly to investigators or give accurate information unless they can be assured of confidentiality. Disclosing information provided in confidence in relation to a complaint might affect the Commission's ability to carry out investigations and its other functions with the co-operation and assistance it

requires. Maintaining confidentiality of those giving information to the Commission is a very important factor to be considered.

The information collected by the Commission during its management of complaints includes personal and private information about the complainant, subject and health service provider. The Commission must comply with the *Privacy and Personal Information Privacy Act 1998 (PIPP Act)* in relation to the collection, use, disclosure, security and retention of personal information. It must also comply with the *Health Records and Information Privacy Act 2002 (HRIP Act)* in relation to the collection, use, disclosure, security and retention of a person's health information.

PIPP Act and *HRIP Act* contain directions regarding information transfers between public sector agencies and processing of personal information or health information by public sector agencies in relation to their investigative functions. The Commission is not required to comply with some sections of *PIPP Act* and *HRIP Act* if those sections might detrimentally affect the Commission's complaint handling or investigative functions. These exemptions are outlined in the Commission's Privacy Management Plan.

Information relating to the Commission's complaint handling, investigative, complaints resolution and reporting functions (including any functions exercised by the Health Conciliation Registry) is excluded information for the purposes of the *Government Information (Public Access) Act 2009*. Documents relating to these functions are not publicly available and an access application cannot be made for this information

HEALTH CARE COMPLAINTS COMMISSION

Section 99B disclosure

under the *Government Information (Public Access) Act 2009*.

The information held by the Commission may detrimentally affect persons or organisations if it were released publicly. In these circumstances there is a clear public interest in protecting the confidentiality of information and the privacy of any person to whom the information relates.

Disclosure of information as part of the Commission's functions

In conducting its complaint handling functions the Commission may disclose information and documents. Most commonly this occurs when the Commission provides a copy of a complaint to a practitioner the subject of that complaint.

Similarly, a practitioner who is no longer working at the health organisation may request copies of medical records held by the Commission that are relevant to the complaint in order to provide an informed response.

Practitioners may also ask the Commission for further information or documents to assist them to better understand the issues raised and provide a better response. These types of disclosures are necessary for the purpose of discharging functions under the Act and are authorised under section 99A as they are 'in connection with the execution and administration' of the Act.

After investigation some complaints will result in the Commission making a public statement or public warning. Other complaints are referred to the Commission's Director of Proceedings to consider disciplinary action. These complaints may ultimately involve a public hearing. This may result in

evidence or information obtained by the Commission being made publicly available.

The majority of complaints received by the Commission are finalised without public proceedings or statements being made, even after investigation and referral to the Director of Proceeding. An example of this is if the Commission has decided not to proceed with a prosecution because the practitioner is no longer registered however the Commission holds information which raises concerns about the conduct of, or the care or treatment provided by a health practitioner.

In these situations the Commission may hold information, such as an expert report, that would assist complainants/subjects to understand what has occurred in their complaint and provide further information about the care and treatment they received. Disclosure of this information may act to assure complainants/subjects that the public has been protected and promote public confidence in the health system and regulation of health services.

Information held by the Commission may also include evidence which is important for the purpose of improving health services and systemic issues where serious departures from standards have occurred. Information held by the Commission may also be relevant to other areas of public protection which are administered and overseen by other agencies

Criteria to be applied for other disclosures

For the Commission to disclose information under 99B of the Act it will consider whether the public interest in

HEALTH CARE COMPLAINTS COMMISSION

Section 99B disclosure

disclosing the information outweighs the public interest in protecting the confidentiality of the information and the privacy of any person to whom the information relates. The Commission will also be guided by the protection of the health and safety of the public as the paramount consideration.

On receipt of a request for information the Commission will assess the public interest criteria on a case by case basis. The Commission will consider the type of information it holds along with the reasons and information provided by the applicant in support of the request. The balance of considerations will vary in each case depending on its particular circumstances.

Applying the criteria

In assessing the criteria to be applied, the Commission will consider:

- the purpose for which the information is sought;
- how the purpose and reasons expressed in support of the application serve the public interest; and
- whether information held by the Commission is relevant to that purpose.

The Commission will need to consider whether there are other legislative provisions which prevent or restrict access to information. For example, documents created for a root cause analysis are privileged.

The Commission will also consider whether there are other ways of obtaining the information, such as:

- from another organisation which holds original records
- the information is already in the public domain (for example there has been a public hearing)

- from another agency or person.

If the information is available from another source, the Commission may decide not to disclose information.

The Commission may think it appropriate to contact any person to whom the information relates to ask if they consent to the release of the information. The Commission will take into account these views in making its decision whether or not to release the information requested. Reports from independent experts obtained by the Commission under section 30 of the Act are subject to particular restrictions. Careful consideration will be given to whether to disclose information in relation to these reports.

The Commission will also consider whether disclosure of the information would assist or prejudice existing investigations and whether it would assist or adversely affect other people or interests.

Requests for information

Other government agencies

The Commission may be requested to disclose information by a range of bodies and agencies. The types of agencies to which information can be disclosed are set out in section 99B (1) and include health service regulatory bodies, law enforcement and prosecuting authorities, investigators and government authorities.

Where the body seeking information has clear public protection functions, the Commission will generally presume in favour of there being a public interest in disclosure, for example, the Coroner, NSW Police Force or Director of Public Prosecutions.

HEALTH CARE COMPLAINTS COMMISSION

Section 99B disclosure

Courts

The Commission is from time to time served with subpoenas in legal proceedings between parties including individuals and organisations. These may be family or civil law matters including medical negligence actions. These are private legal actions and, if no information is provided which addresses the public interest in producing the documents, the Commission will not produce documents. However, the Commission will consider any further application including information and reasons as to why information should be disclosed in the public interest to the court under section 99B of the Act.

The Commission will generally consider that if the request is in relation to criminal or disciplinary matters there is significant public interest in disclosure, however, each request will be assessed a case by case basis.

The Commission will also consider whether there are any other sources of obtaining the information.

Health practitioners

Health practitioners who are the subject of an investigation may request information held by the Commission. The Commission has an obligation to provide information on the progress and outcomes of investigations to health practitioners who may be adversely affected by the result of an investigation.

Health practitioners may wish to obtain other information held by the Commission including the responses of other practitioners to associated complaints or the identity of witnesses or complainants. If disclosure in such circumstances is not necessary for the execution and administration of the Act,

they will be considered in line with this protocol.

Clients and complainants

Complainants and clients of health service providers may understandably wish to obtain information to better understand their treatment and the investigation of complaints.

Under the Act the Commission is able to provide information to clients to keep them informed of the progress of their complaint, the issues arising and the outcomes. This assists in managing complainant's expectations and promotes confidence in the Commission's handling of their complaint. Information or documents which have previously passed between the Commission and the client will be generally able to be disclosed.

If a complainant or client of a health service provider wishes to obtain information obtained by the Commission, they may write to the Commission and provide reasons why they want the information. Oral requests for information will also be considered.

The Commission will consider whether disclosure of this information is in the public interest and whether the public interest in disclosure outweighs the public interest in protecting the confidentiality and privacy of those providing the information.

If the information is likely to be in the public domain as a result of public proceedings or statements, the Commission may decide not to disclose information. However, where a matter does not proceed to a public forum and there is information highly relevant to a patient's health and safety, the Commission may consider there to be legitimate and public interest in disclosure. For example, where a

HEALTH CARE COMPLAINTS COMMISSION

Section 99B disclosure

prosecution of a complaint is withdrawn and no evidence or findings will be publicly released, a client may request information concerning the care and treatment investigated by the Commission to assist them to better understand the treatment they received and their future health needs. The information may be in the form of expert reports, records or documents obtained during the assessment or investigation of their complaint. This information may fall into highly confidential or sensitive categories and the consent of the person providing the information may need to be obtained.

If information is disclosed, the Commission will decide how much information should be disclosed and the way in which it will be disclosed. For example whether to provide information: orally or in writing; in summary form or providing particular documents; or by way of documents redacted to remove details identifying certain people and their private information or about other cases. The Commission will also have to consider timing of disclosure as release of information at certain times may prejudice an ongoing investigation by the Commission or other agencies.

Decisions regarding the release of information under section 99B will be made by the Commissioner.

To request information

If information held by the Commission is requested, contact can be made with the Commission by telephone or in writing. If contact is made with a Commission officer by telephone, the person requesting information will be asked to clarify their request in writing outlining the purpose of the request and if possible, detailing the information required. If it is not possible for the

request to be made in writing, the Commission can assist a person to do so if requested.

Requests can be directed to:

Executive Officer
Health Care Complaints
Commission
Locked Mail Bag 18
STRAWBERRY HILLS NSW
2012

DX 11617
SYDNEY DOWNTOWN

hccc@hccc.nsw.gov.au

Ph: 9219 7444