

# The Shopfront

## YOUTH LEGAL CENTRE

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### Confidentiality and Privacy for Youth Workers

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#### 1 Introduction

##### 1.1 The principle of confidentiality

The concept of confidentiality is well known to most youth 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** (eg 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** (eg the sexual assault communications privilege and confidential communications privilege in the *Evidence Act* and the *Criminal Procedure Act*);
- (c) **allowing you to disclose information which would otherwise be confidential** (eg 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** (eg the mandatory reporting provisions of the *Children and Young Persons (Care and Protection) Act*).

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

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#### 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* used to apply only to government agencies and organisations with government contracts. It was amended in December 2001 to make some non-government organisations responsible for safeguarding the privacy of personal information about their clients.

As well as government agencies, the Act applies to businesses and non-government organisations with an annual turnover of \$3 million or more. The Act also covers private health service providers and organisations (including counsellors, private GPs and private hospitals, or an organisation providing any service under a Commonwealth government contract - eg Job Network). The Act also covers organisations that trade in personal information for a benefit, service or advantage (such as real estate agencies and direct marketers).

The Act does not cover some acts and practices. Employers' use of employee records for employment purposes are exempt from the Act. Also, the use of personal information by media organisations "in the course of journalism" is not covered along with political acts and practices by political parties.

The law requires organisations to follow the *National Privacy Principles* (NPPs), which can be found at [www.privacy.gov.au](http://www.privacy.gov.au).

### (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 (eg 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 (eg 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 NPPs, 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.

While the Act deals mainly with public sector organisations, some private organisations that receive state funding may be categorised as a government agency for the purposes of the Act. For example, refuges funded by 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 National 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 <http://www.privacy.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) (HRIP Act). The HRIP Act 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.

The 15 health privacy principles (HPPs) are the key to the HRIP Act. They are legal obligations describing 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 <http://www.privacy.nsw.gov.au>.

## 3 Disclosure of a person’s HIV/AIDS status

### 3.1 Category 5 medical condition

The *Public Health Act 2010* (NSW) (the relevant provisions came into force on 1 September 2012, replacing the old Act) 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 HIV or AIDS.**

### 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) is, or has been infected with, 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

Information about a person's HIV/AIDS status **may be disclosed**:

- (a) with the person's consent, or
- (b) in connection with the administration of the *Public Health Act* or another Act, or
- (c) by order of a court, or
- (d) to a person who is involved in the provision of care to, or treatment or counselling of, the other person if the information is required in connection with providing such care, treatment or counselling, or
- (e) 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 (eg 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 (eg 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 (eg 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 Community Services** if they believe on reasonable grounds that a young person under 18 is at risk of significant harm.

Reports may be made anonymously.

### 4.4 Protection of people who report

Reports made to Community Services (whether voluntary or mandatory) are treated confidentially. However, recent amendments allow the identify 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 notifier from being sued for **breach of confidentiality**, the inadmissibility of evidence regarding the report would make it difficult for anyone to sue a notifier for this.

### 4.5 Further information

Please see the separate document *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

In October 2009, a new Chapter 16A was introduced into the *Children and Young Persons (Care and Protection) Act*.

This provides for government agencies and certain non-government organisations to **exchange information** relating to a child (under 16) or young person's (16 or 17) well-being. 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 Community Services

Under section 248 of the *Children and Young Persons (Care and Protection) Act*, 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.

There is another type of privilege, also with a long history, which protects the confidentiality of religious confessions.

### 6.3 Sexual assault and confidential communications 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 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 worker - **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 must disclose the information.

## 7 Reporting of criminal activity

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

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

- (a) a serious indictable offence has been committed; and
- (b) you know or believe that it has been committed; and
- (c) you know or believe you have information which could assist in the apprehension or conviction of the offender; and
- (d) you fail, without reasonable excuse, to bring this to the attention of the police or other appropriate authority;

you are guilty of an offence and could face up to 2 years' imprisonment (or 5 years if you conceal the offence in return for some personal benefit).

### 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 5 years or more. This would include offences such as stealing (even something of negligible value such as a chocolate bar!), unlawful use of a motor vehicle, malicious damage, assault occasioning actual bodily harm or supplying a prohibited drug. It would not include offences like offensive language, soliciting, most traffic offences, carrying a pocket knife, 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

In 1998, the NSW government recognised the position of professionals and passed some **amendments** to section 316.

The consent of the Attorney-General is required 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**.

**It is therefore very unlikely that a youth worker, counsellor, etc would be charged** with this sort of offence. It is usually only used where police think someone was involved in a crime but there is not enough evidence to find them guilty of the on the main charge.

### 7.5 Law Reform Commission recommendations

In 1999, the NSW Law Reform Commission reviewed section 316 and recommended substantial changes. The Commission recommends doing away with the charge of “concealing a serious offence”, unless you are doing it in return for some financial benefit. So far this recommendation has not been adopted by Parliament.

### 7.6 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 must do something to help them escape justice, eg helping them get rid of stolen goods, assisting them to flee, or giving them a place to hide from police.

### 7.7 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 refusing to allow them to execute a search warrant. It is possible that providing false information (with the intention of deceiving the police and getting them off your client's trail) may amount to hindering.



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## 8 Escapes and warrants

### 8.1 Harboursing an escapee

If you know (or have a fair idea) that a person has escaped from a prison or detention centre, you should probably call the police, or at least warn the person that they cannot use your service without getting you (and themselves) into trouble. 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.

### 8.2 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.

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## 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.

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## 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.

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## 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 victims, etc, who may also be clients of yours) 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 (and your chances of assisting the client's rehabilitation) that you would be justified in not reporting a client's crimes or threats.

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

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*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 September 2012 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.*

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