

PATIENT CONFIDENTIALITY & DIVULGING PATIENT INFORMATION TO THIRD PARTIES

A. Definitions

1 In this Operational Circular, the term:

1.1 “*Teaching hospitals*” means Royal Perth Hospital, Sir Charles Gairdner Hospital, Fremantle Hospital, King Edward Memorial Hospital and Princess Margaret Hospital.

1.2 “*Health professional*” means medical practitioners, nurses, allied health professionals and all other persons involved in the provision of health services to patients.

1.3 “*Patient*” is synonymous with ‘client’ and ‘consumer’.

B. Duty of confidence

2 Health professionals are under a duty to maintain the confidentiality of all information that comes to them in the course of their relationship with patients. The duty protects information created, disclosed or acquired directly or indirectly in the context of the patient and health service provider relationship.

3 All persons, including administrative staff, who come into contact with the information as part of the health care process also have a duty to maintain the confidentiality of that information.

4 The general principle is that the duty of confidence prevents the disclosure of the information to individuals and organisations not involved in providing the health service. However, there are a number of exceptions where otherwise confidential information may be disclosed to third parties (see section E below).

5 The duty of confidence does not end when the professional relationship with the patient has ceased. Nor does it end with the death of the patient.

C. Basis for duty of confidence

6 The duty of confidence can arise by statute, under the common law and in equity.

7 An example of a statutory duty of confidence is Section 206(1) of the *Mental Health Act 1996* (“**MHA**”) which provides:

“(1) A person must not directly or indirectly divulge any personal information obtained by reason of any function that person has, or at any time had, in the administration of this Act or the Mental Health Act 1962.

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D. Consequences of breach of confidentiality

8 A breach of the duty of confidence can have a number of consequences. For instance, it may lead to:

8.1 Disciplinary action by the employer of the person who made the disclosure.

- 8.2 An action for damages against the person who made the disclosure and/or his or her employer.
- 8.3 A disciplinary proceeding under the health professional's regulatory statute.
- 8.4 The imposition of a fine where there is a contravention of a statutory duty of confidence.

E. Disclosure of patient information

- 9 There are a number of exceptions to the duty of confidence. Where the duty arises under the common law or in equity, these exceptions include:
 - 9.1 Where the patient (or his/her parent or legal guardian in the case of a patient who is a minor or a mentally incompetent adult) consents to the disclosure of the information (see section F below).
 - 9.2 Where the public interest justifies disclosure of the information (see section G below).
 - 9.3 Where disclosure of the information is required or permitted by operation of the law (see section H below).
- 10 Where a statutory duty of confidence exists, one must look to the relevant statutory provision for the circumstances (if any) in which the information may be disclosed. For example, Section 206(2) and (3) of the MHA contain a number of exceptions to the statutory prohibition on disclosure of information contained in Section 206(1):
 - “(1) A person must not directly or indirectly divulge any personal information obtained by reason of any function that person has, or at any time had, in the administration of this Act or the Mental Health Act 1962.
Penalty \$2 000
 - (2) Subsection (1) does not apply to the divulging of information-
 - (a) in the course of duty;
 - (b) under this Act or another law;
 - (c) for the purposes of the investigation of any suspected offence or the conduct of proceedings against any person for an offence; or
 - (d) with the consent of the person to whom the information relates, or each of them if there is more than one.
 - (3) Subsection (1) does not apply to the divulging of statistical or other information that could not reasonably be expected to lead to the identification of any person to whom it relates.”

F. Disclosure by consent

Generally

- 11 If a mentally competent adult patient expressly consents to the disclosure of information about him/herself to a third party, it will not be a breach of the duty of confidence to disclose the information provided the disclosure is made in accordance with the consent given. In other words:
 - 11.1 Only the person(s) and/or organisations expressly authorised to divulge the information to the third party may do so.
 - 11.2 Only information falling within the scope of the consent may be disclosed.

- 11.3 The information may only be disclosed to those person(s) or organisations in respect of which consent has been given.
- 12 Consent to the release of patient information need not be expressly given in each circumstance and may be implied in certain situations.
- 13 For example, individuals within a health facility who have a legitimate therapeutic interest in the care of the patient may generally have access to the information they need to know in order to provide appropriate care and treatment. Consent to the sharing of information in these circumstances will generally be implied.
- 14 If a health professional wants advice, or simply wishes to talk over the patient's treatment with a colleague who is not involved with the patient's care but the patient has not expressly consented to the same, identifying information should not be given.
- 15 Where the information is required for emergency treatment at another health facility, the information should be given, but after verification of the requesting body or person, by taking their name and telephone number and ringing back. A note should be made of the information released, to whom it was released, and the reason for the request. Where the request is non-urgent, the patient's written consent should be obtained before the information is released.
- 16 If in doubt whether a patient has consented to the release of information in any given circumstance, the express written consent of the patient should be sought.

Minors and mentally incompetent adult patients:

- 17 If the patient is a minor (i.e., a person under 18 years of age) or mentally incompetent adult, the consent of the patient's parent or legal guardian is necessary before information pertaining to the patient can be released to third parties.
- 18 Parents have full responsibility for each of their children who is under 18 years. Parental responsibility is not affected by changes to relationships (i.e., if the parents separate, divorce or remarry). Nor is parental responsibility affected by the mere fact the child has been apprehended by the Department for Community Development ("DCD") pursuant to its powers under the *Child Welfare Act 1947* ("CWA").
- 19 This means the consent of either parent to the release of confidential information pertaining to his or her child (being under 18 years of age) is usually sufficient. However, the consent of both parents is preferable where possible to avoid potential conflict.
- 20 Parental responsibility can be varied by Court order in which case, consent to the release of confidential information pertaining to the child concerned will have to be obtained in accordance with the Court order.
- 21 In a family breakdown situation (i.e., separation or divorce), parental responsibility may be varied where the Court makes an order stipulating that one parent has certain responsibilities to the exclusion of the other parent. The Court can make 4 types of parental orders. The 4 types are residence orders, contact orders, child maintenance orders and specific issues orders.
- 21.1 A **residence order** or **specific issues order** may stipulate that one parent has sole responsibility for the child's day-to-day care, welfare and development. If this type of order has been made, that parent will be the only parent that can consent to the release of information pertaining to the child the subject of the Court order.

- 21.2 If there is an arrangement for the child to live with one parent for part of the time and the other for part of the time, this is a **residence order**. Both parents retain full parental responsibility for the child, however, the consent of either parent would be sufficient to authorise the release of confidential information pertaining to his or her child the subject of the Court order.
- 21.3 If a **specific issues order** is made granting one parent the sole responsibility for health care decisions, that parent will be the only parent that can consent to the release of health information pertaining to his or her child the subject of the Court order.
- 22 Parental responsibility may also be affected by an order of the Court or the Minister for Community Development made under the CWA committing a child to the care of the DCD (i.e., making the child a Ward of the State) or placing the child under the control of the DCD. In those circumstances, the appropriate person to give consent to the release of confidential information about the child is the DCD's Director-General or such other person as stipulated in the order or otherwise lawfully authorised by the DCD's Director-General. See further paragraphs 84 to 87 below.
- 23 Where a child has been apprehended under the CWA but no formal court or Ministerial order has been made, the appropriate persons to give consent to the release of confidential information are the child's parents.
- 24 In the absence of a valid consent as discussed in paragraph 22 and 23 above, information may only lawfully be disclosed to the DCD in the limited circumstances provided by Sections 146C(3), 29(3a) and 10C of the CWA (see paragraphs 58 to 83 below), or where there is an overriding public interest favouring disclosure (see paragraphs 31 to 40 below).
- 25 As a general rule, it is reasonable to assume that either parent can consent (alone) to the release of confidential information relating to his or her child who is a minor unless information is available to suggest a Court order (or Ministerial order under the CWA) has been made stipulating something different. In that event, a copy of the Court order should be obtained to ascertain its terms or, in the case of the DCD only, written confirmation obtained of the terms of the order that has been made under the CWA. If difficulties in understanding the terms of the Court or Ministerial order arise, advice should be sought from Legal & Legislative Services (or from the State Solicitor's Office in the case of teaching hospitals only).
- 26 A minor may consent to the release of their own health information provided they adequately understand and appreciate the reason for and consequences of the information to be released. If in any doubt as to the 'maturity' of the child in this regard, it is prudent for health professionals and other hospital/health service staff to also obtain the consent of the parent or guardian, unless the patient objects.
- 27 Whether a patient is sufficiently mature to make decisions concerning the release of confidential information on his or own behalf, will vary from case to case. There is no fixed age rule. Consequently, it cannot be said with any certainty that a minor who has reached a certain age is capable of making a decision in respect of his/her own person. Equally, it cannot be said that below a certain age a minor is incapable of doing so.
- 28 Where a health professional has assessed a child patient to be a 'mature minor', it will be more difficult for the patient's parents to subsequently assert their parental rights have been interfered with in the event confidential patient information is released to third parties as agreed to by the 'mature minor'.

- 29 Health professionals who assess a patient as a 'mature minor' should make a note of the factors taken into account in reaching that conclusion.

Deceased patients

- 30 In the case of a deceased adult patient, the deceased's executor is the relevant person to give consent.

G. Public interest disclosure

- 31 As a general principle, the 'public interest' exception recognises that there may, on occasion, be a need to breach confidentiality because of an overriding public interest favouring disclosure of information to a third party. In such circumstances, the disclosure of the information to a responsible authority may be justified.
- 32 The public interest exception to the duty of confidence is founded in public policy. It is the most important and controversial exception to a health professional's duty of confidence.
- 33 Where there are competing public interests, one favouring the preservation of confidentiality and one favouring disclosure, the more compelling public interest should prevail.
- 34 The notion of public interest is flexible but has no clearly defined rules governing when disclosure is permitted and when it is not. It can therefore sometimes be difficult to determine where the balance of public interest lies in a given case.
- 35 Disclosure of confidential information in the public interest will only be justified in exceptional circumstances. This usually arises in circumstances where there is a real and immediate risk of danger to the public (which can include a single person). The risk must be sufficiently grave.
- 36 In circumstances where there is a real and identifiable risk of danger to the public or any person, confidential information may be disclosed to a responsible authority. Disclosure must only be made to a responsible authority with a proper interest in receiving the information. Disclosure must not be made to the world at large. Further, the risk to the public or an individual must be a 'real risk' and only the facts necessary to reduce or eliminate the risk concerned should be disclosed.
- 37 For example, a health professional in possession of confidential patient information that suggests there is an immediate and real danger posed by a patient to the life or health of a child may be justified in disclosing that information to the DCD or the police. Similarly, an overriding public interest may justify a disclosure to the DCD or the police where the person's whose life or health is in immediate and real danger is the patient who is a minor (i.e., a person under 18 years of age).
- 38 The law in the area of what constitutes a 'public interest' is complex and uncertain. Whether disclosure of otherwise confidential information is justified in the public interest is a question of fact to be determined in the circumstances of each individual case. This necessarily involves determining whether the public interest served in maintaining the confidence is outweighed by the public interest in disclosing it.
- 39 Any decisions as to whether information in relation to a patient should be provided to third parties in the public interest should be made only at a senior level within the health organisation's administration. Wherever practicable, it is recommended that there be consultation with the treating medical practitioner. The factors taken into

account in reaching a decision to disclose confidential information in the public interest should be well documented.

- 40 It is recommended that advice be sought from Legal & Legislative Services (or, in the case of teaching hospitals, the State Solicitor's Office) before a 'public interest disclosure' is made.

H. Disclosure by operation of the law

- 41 Disclosure of confidential information may be permitted or required by operation of the law. For example:

41.1 Statutory provisions that require or permit disclosure (see paragraphs 42 to 44 below).

41.2 A summons or subpoena which requires the production of information (see paragraphs 45 to 52 below).

Statutory disclosure

- 42 A statute may impose a legal duty on health professionals and other individuals to disclose certain information. For example, Section 300 of the *Health Act 1911* requires medical practitioners to give notification to the Department of Health's Executive Director, Public Health of any person with a venereal disease in an infectious stage.

- 43 Alternatively, a statute may permit the disclosure of otherwise confidential information in specified circumstances without creating a legal obligation to do so. For example, Sections 146C(3) and 10C(4) of the CWA which permit information to be divulged to the DCD in limited circumstances (see section I below).

- 44 Where information is disclosed to the responsible body pursuant to a statutory authority there will be no actionable breach of confidence. However, information disclosed must be limited to that necessary to comply with the statutory requirement or to that permissible under the relevant statutory provision.

Subpoenae and summonses

- 45 A subpoena (sometimes called a summons) is an order of the Court that requires the subpoenaed party to attend the Court to either produce documents, give evidence or both.

- 46 A subpoena cannot compel the creation of a document that does not already exist. In other words, it cannot compel a health professional to prepare a medical report for use by a party to legal proceedings.

- 47 Failure to comply with a valid and properly served subpoena can amount to contempt of Court.

- 48 Confidential communications between health professionals and patients are not privileged. Consequently, health professionals can in general be compelled at law to disclose to a Court confidential information concerning patients by means of a subpoena. Where confidential patient information is divulged to a Court in response to a valid subpoena no breach of confidence will arise.

- 49 Where a patient's medical records are subpoenaed, the patient should be informed of the subpoena where such patient is not a party to the proceedings. The patient

should be advised of the date of compliance (return date) for the subpoena as well as the place, date (generally the same as the return date) and time of any Court hearing that has been listed for the return of the documents. The patient should be provided with this information as soon as possible to allow sufficient time for the patient to arrange to attend the Court should he/she wish to raise objections to the documents subpoenaed.

50 It is possible for a subpoenaed party to apply to the Court for an order to set aside a subpoena or raise objections to production of documents the subject of a subpoena in certain circumstances. For example:

50.1 *Abuse of process* – It may be possible to have the subpoena set aside where a party to legal proceedings compels production and inspection of documents other than for a legitimate forensic purpose (for example, the subpoenaed documents are not relevant to the issues in dispute in the action).

50.2 *Oppression* – It may be possible to have the subpoena set aside where the terms of a subpoena are so wide and insufficiently precise as to make compliance (the collation and production of documents) onerous. Similarly, it may be possible to set aside the subpoena where it is used for the purpose of "fishing" for information that a party hopes but does not reasonably expect is in existence.

50.3 *Public interest immunity* – It may be possible to set aside a subpoena where the public interest that would be served by withholding certain documents is so strong that it overrides the public interest in the following due process. For example, documents which may affect national security or some other extraordinary public interest.

50.4 *Legal professional privilege* – Communications between a solicitor and client, or between a solicitor and another person, created for the dominant purpose of the client being provided with legal advice or professional legal services relating to a pending or anticipated Court proceeding may be protected from disclosure in Court proceedings.

50.5 *Qualified privilege* - Qualified privilege applies to approved quality assurance committees under the *Health Services (Quality Improvement) Act 1994*. Section 10 of the Act operates to prevent documents created by or at the request of an approved quality improvement committee (or solely for the performance of the committee's functions) being used in civil proceedings unless the document has been made available to the public or given to the Minister or the governing body of the Committee. Similarly, any person who acquires information solely as a result of an approved quality assurance committee performing its functions is neither competent nor compellable in civil proceedings to divulge or communicate that information to any Court.

51 Depending on the complexity of the case, advice should be sought from Legal & Legislative Services (or, in the case of teaching hospitals, the State Solicitor's Office) before lodging a challenge to a subpoena or before assuming that the confidentiality of a patient communication will be immune from court-ordered disclosure.

52 At the same time, officers within the WA Government health system should not freely or without question disclose to the Court information that they have an ethical or legal duty to keep confidential. Courts are sensitive to legitimate claims to client confidentiality, will hear argument on them, and will act fairly to preserve them in appropriate circumstances.

I. Disclosure to the Department for Community Development (“DCD”)

- 53 The DCD has statutory powers under the *Child Welfare Act 1947* (“CWA”) to apprehend any child under 18 years appearing or suspected of being in need of care and protection.
- 54 A ‘child in need of care and protection’ is defined in the CWA as including a child:
- 54.1 Without sufficient means of subsistence and whose near relatives are in indigent circumstances or are otherwise unable or unwilling to support the child, are dead, unknown, cannot be found, are out of the jurisdiction or are in the custody of the law.
 - 54.2 Not being maintained properly or at all by a near relative, or who has been deserted.
 - 54.3 Who is ill-treated, or suffers injuries apparently resulting from ill-treatment.
 - 54.4 Lives under conditions which indicate that the child is lapsing or likely to lapse into a career of vice or crime.
 - 54.5 Who is living under conditions, or behaves in a manner, that indicates the mental, physical or moral welfare of the child is likely to be in jeopardy.
- 55 In WA, there is no specific statutory requirement for the reporting of actual or suspected child abuse or neglect to the DCD. Nor is there any specific statutory requirement (with the limited exception of Section 29(3a) discussed below) compelling individuals and organisations to assist the DCD by divulging medical records, preparing medical reports and witness statements or otherwise answering questions.
- 56 However, no breach of confidence will arise where confidential patient information is divulged to the DCD or its Director-General (as appropriate) in the following circumstances:
- 56.1 Where the patient (or his/her parent or legal guardian in the case of a patient who is a minor) consents to the disclosure of the information (see section F above).
 - 56.2 Where the disclosure of the information is justified in the ‘public interest’ (see section G above).
 - 56.3 Where a person makes a report to the DCD pursuant to Section 146C(3) of the CWA (see paragraphs 58 to 66 below).
 - 56.4 Where a child is detained in a hospital and notice and particulars are given to the DCD under Section 29(3a) of the CWA (see paragraphs 67 to 75 below).
 - 56.5 Where a public authority divulges ‘relevant information’ to the DCD’s Director-General (or his/her authorised delegate) pursuant to Section 10C of the CWA (see paragraphs 76 to 83 below).
 - 56.6 Where the DCD’s Director-General consents (in writing) to the release of information relating to a child who has by order of the Court or the Minister for Community Development (in writing) been made a Ward of the State or placed under the control of the DCD (see paragraph 84 to 87 below).

57 Disclosure of confidential patient information in response to a subpoena to produce documents or to give evidence issued on behalf of the DCD must be made to the Court and not the DCD.

Report with respect to the circumstances of child - Section 146C(3) of the CWA

58 Section 146C(3) of the CWA provides that:

“...(3) A person who on reasonable grounds and in good faith for the purposes of facilitating the enforcement of the provisions of this Act makes a report with respect to the circumstances of a child is not liable to any action for damages or any other legal proceeding in respect of that report..”

59 In general, Section 146C(3) of the CWA permits individuals (such as health professionals) who reasonably believe a child has or may suffer abuse or neglect, or who have reasonable concerns about the health, safety or welfare of a child, to report the child to the DCD. The provision gives individuals the power to report a child to the DCD without creating any legal obligation to do so.

60 No personal liability will attach to the person making the report to the DCD provided he/she acts on reasonable grounds and in good faith.

61 Prior to reporting a child to the DCD, health professionals should assess the facts of the particular case to determine whether making the report is reasonably justified in the circumstances. There is no requirement that the child must be at imminent, likely and serious risk of harm before a Section 146C(3) report to the DCD can be justified.

62 In general, a person is deemed to be acting on reasonable grounds where the motive for the person’s conduct or the basis for the person’s belief/suspicion (from an objective viewpoint) is just and appropriate in all the circumstances of the case. Similarly, a person will be deemed to be acting in ‘good faith’ where he/she acts honestly.

63 When making a report to the DCD under Section 146C(3) of the CWA, care must be taken to ensure that only information pertaining to the circumstances of the child is divulged to the DCD.

64 Any decision to report a child to the DCD under Section 146C(3) of the CWA should be well documented.

65 It should be noted that Section 146C(3) does not provide authorisation for the release of the child’s medical records to the DCD or to the police. Nor does it authorise the preparation and release to the DCD or the police of medical reports and witness statements.

66 Requests by the DCD seeking copies of the child’s medical records, for information about the child falling outside the scope of what is permitted under Section 146C(3) of the CWA, or for the preparation and release of medical reports and witness statements, should be made pursuant to Section 10C of the CWA discussed in paragraphs 76 to 83 below.

Detention in hospital under Section 29(3a) of the CWA

67 At common law, health professionals have a duty to take all reasonable care for the welfare of patients. Generally, the duty of care will arise when the patient presents at the hospital/health service for medical attention and the hospital/health service (through its staff) accepts responsibility for the treatment of the patient.

- 68 The duty of care may, arguably, include a duty to predict whether a child is at risk of harm from abuse or neglect if he/she is discharged into the custody of his/her parents.
- 69 Health professionals who fail to take steps that a reasonable person would take to prevent a reasonably foreseeable risk of harm to a patient may be held liable at common law in negligence.
- 70 Section 29(3a) of the CWA gives a medical officer in charge of a hospital (or his/her deputy) the power to order that a child be detained in that hospital for a period up to 48 hours for the purposes of observation, assessment or treatment where:
- 70.1 The child has been admitted to that hospital.
 - 70.2 The child is under 6 years' of age.
 - 70.3 There are reasonable grounds to suspect that the child is in need of care and protection.
- 71 A medical officer who orders the detention of a child in hospital must immediately telephone the DCD to inform it of the name and address of the child concerned and the circumstances surrounding his/her admission to the hospital. The telephone notification should be made to:
- 71.1 In the metropolitan area, the DCD Division responsible for the area in which the child resides (when calling during normal business hours) or, alternatively, the DCD's Crisis Care Unit (when calling outside normal business hours).
 - 71.2 Outside the metropolitan area, the local Division or District Office of the DCD.
- Contact details for the above can be found on the DCD's website at www.community.wa.gov.au by clicking "contacts".
- 72 Once informed of the child's detention in hospital, the DCD will allocate a DCD case officer to handle the matter.
- 73 Upon request from the DCD case officer, the hospital's medical officer must provide (within 24 hours of the request being made) to that officer written particulars specifying so far as the same is known to the medical officer:
- 73.1 The name and sex of the child.
 - 73.2 The date and place of birth of the child.
 - 73.3 The names of the parents or caretakers of the child.
 - 73.4 The addresses and telephone numbers of the parents/caretakers of the child.
 - 73.5 Full particulars of all injuries or ill-health observed.
 - 73.6 Particulars of any relevant medical history.
- 74 After investigating the matter and consulting with the hospital's medical officer, the DCD case officer must give written notice to the medical officer as to whether the child has been apprehended or may be discharged from the hospital.
- 75 At the expiration of the period of detention, the child must either:
- 75.1 Be discharged from the hospital.
 - 75.2 Remain in the hospital with the consent of a parent or guardian.

- 75.3 Be apprehended under Section 29 or committed to the DCD's care under Section 47B (in the case of a child without any parents or where the parents whereabouts are unknown) of the CWA.

Disclosure of information under Section 10C of the CWA

- 76 Section 10C of the CWA provides:

“(1) *In this section-*

“corresponding authority” means a person or body in another State or Territory, or another country, that has function corresponding to those of the Director-General under this Act;

“public authority” means-

- (a) a department of the Public Service;*
- (b) a State agency or instrumentality;*
- (c) a local government or regional local government; or*
- (d) a body, whether corporate or not, or the holder of an office, post or position, established or continued for a public purpose under a written law;*

“relevant information” means information that, in the opinion of the Director-General, is or is likely to be, relevant to-

- (a) the health, safety or welfare of a child or class of children; or*
- (b) the performance of functions under this Act.*

- (2) The Director-General may disclose relevant information to a public authority or a corresponding authority.*
- (3) The Director-General may request a public authority or a corresponding authority that holds relevant information to disclose the information to the Director-General.*
- (4) A public authority may, despite any other written law, comply with a request under subsection (3).*
- (5) If information is disclosed in good faith, under subsection (2) or in compliance with a request under subsection (3)-*
 - (a) no civil or criminal liability is incurred in respect of the disclosure;*
 - (b) the disclosure is not to be regarded as a breach of any duty of confidentiality or secrecy imposed by law; and*
 - (c) the disclosure is not to be regarded as a breach of professional ethics or standards or an unprofessional conduct.”*

- 77 Section 10C(4) of the CWA, permits public authorities (e.g., public hospitals) to release confidential information to the DCD's Director-General or his/her authorised delegate in compliance with a request for the same made under Section 10C(3) of the CWA (“**Section 10C request**”).

- 78 A Section 10C request is not enforceable. Consequently, whilst public authorities have the power to comply with Section 10C requests, there is no legal obligation to do so.

- 79 No civil or criminal liability or breach of confidence will attach to a public authority that divulges information in compliance with a Section 10C request, provided information is disclosed in good faith and the disclosure occurs in the following manner:

79.1 There must be a request.

79.2 The request must be, and be stated to be, from the Director-General of DCD or his/her authorised delegate under Section 10B of the CWA.

Section 10B of the CWA permits the DCD's Director-General to delegate (in writing) to any DCD officer any function conferred on the Director-General under the CWA.

The following DCD officers are authorised, by instrument of delegation signed by the DCD's Director-General (Jane Brazier) on 13 October 2003 ("**the 2003 delegation**"), to make Section 10C requests:

- Executive Director Community Development and Statewide Services.
- Director North Division.
- Director South Division.
- Director East Division.
- District Managers.
- Team Leaders.
- Senior Field Officers.
- Case Managers.

Where someone other than the DCD's Director-General makes a Section 10C request, the identity of such person must be ascertained and verification of his/her authority to make the request (i.e., under the 2003 delegation or such other instrument of delegation that supersedes it) obtained before any information is divulged.

It is not sufficient that a Section 10C request is made, for example, by a person claiming to be a DCD social worker if that person does not also confirm that he/she holds one of the positions expressly listed in the 2003 delegation above (or its replacement).

79.3 The request must be made to a public authority that holds the information. The request must not be made to an individual employee of the public authority.

79.4 The request must specify the relevant information sought.

79.5 The DCD's Director-General (or his/her authorised delegate) must only request "*relevant information*".

However, the responsibility for assessing whether information is "*relevant information*" rests with the DCD's Director-General (or his/her authorised delegate). As such, there is no necessity for the public authority to make such assessment.

Nevertheless, it would be prudent for the request to state that in the opinion of the DCD's Director-General (or his/her authorised delegate), the information sought is or is likely to be relevant to the health, safety or welfare of a child (or class of children) or, alternatively, the performance of functions under the CWA.

79.6 The request must expressly ask the public authority to provide the information sought to the DCD's Director-General (or his/her authorised delegate).

79.7 The actual disclosure must be made to the Director-General, or his/her authorised delegate.

80 In the absence of an appropriate consent to release confidential information or an overriding public interest, the DCD should be asked to make all requests for patient medical records, the creation of medical reports and witness statements, and other

patient information pursuant to Section 10C(3) of the CWA. The exception to this is a request for particulars where a child has been detained in a hospital under Section 29(3a) of the CWA (see paragraph 73 above).

- 81 In non-urgent situations, it is generally preferable for Section 10C requests to be made in writing. A pro-forma Section 10C request appears at Annexure A to this Operational Circular. Where required, the Annexure may be copied and forwarded to the DCD for its use as a template when making Section 10C requests.
- 82 In emergency situations, confidential information may be released on the basis of a verbal request from DCD provided the request is expressly stated to be made pursuant to Section 10C of the CWA and the requirements outlined in paragraph 79 above are satisfied. The person receiving the verbal request on behalf of the public authority should make a detailed note of the conversation with DCD's Director-General or his/her authorised delegate as the case may be. In addition, the requestor should be asked to submit a written request satisfying the requirements outlined in paragraph 79 above within a specified period (say, 3 days) after making the verbal request.
- 83 Where a Section 10C request is made by someone other than the DCD's Director-General or his/her authorised delegate, the request must be declined. The requestor should be asked instead to arrange for the DCD's Director-General or his/her authorised delegate to make the request ensuring compliance with the requirements of Section 10C as outlined in paragraph 79 above prior to any information being divulged.

Consent of the DCD's Director-General under Section 50 of the CWA

- 84 Where requests are made for confidential information about a child who has by order of the Court (or by written order of the Minister for Community Development) either been made a Ward of the State or placed under the control of the DCD, the DCD's Director-General may consent (in writing) to the release of information concerning that child. In the case of a child placed under DCD's control, the power to give consent only arises where the minor's parent or guardian is unwilling or unable to do so.
- 85 Under the 2003 delegation, the DCD's Director-General has delegated power to give consent in the above circumstances to DCD's Executive Directors of Community Development and Statewide Services, Program and Sector Development and Office for Children and Youth.
- 86 Where an officer from the DCD is making the request for information, the officer concerned should be asked to put the request in writing. The request should detail the orders that have been made by the Court, specify the information being requested and attach the written consent of the DCD's Director-General (or authorised delegate) to the release of the information.
- 87 Only information relating to the child who has been made a Ward of the State, or placed under the control of the DCD, may be released pursuant to the written consent of the DCD's Director-General (or authorised delegate) in these circumstances.

The Children and Community Services Act 2004

- 88 The *Children and Community Services Act 2004* ("the **CCSA**") was given royal assent on 20 October 2004 but is yet to come into force. Until then, the provisions of the CWA continue to apply.

- 89 The definition of a ‘child in need of care and protection’ as well as Sections 10C, 29(3a) and 146C of the CWA are to be replaced with Sections 28(2), 23, 40 and 129(1)(a) of CCSA respectively once enacted.

J. Disclosing confidential information to the WA Police Service

- 90 In WA, there is no general legal obligation on health professionals and other individuals to report the commission or suspected commission of an offence to the police. However, some statutes permit the reporting of certain offences (e.g., the *Firearms Act 1973*).
- 91 Health professionals and other WA Government health system staff are not legally required to assist the police by answering questions about particular patients and may decline to do so without committing any offence. However, where assistance is given to the police, the individual providing the assistance must not give false or misleading information. Any active steps taken to prevent or obstruct the discovery or investigation of an offence by the police will constitute an offence.
- 92 The police have no general power to compel health professionals or other individuals to answer their questions, provide witness statements or prepare medical reports (e.g., outlining a patient’s injuries and treatment following an assault) or otherwise create documents not already in existence.
- 93 However, the police can compel the production of pre-existing documentation but only by means of a valid search warrant or similar Court order.
- 94 In the absence of a valid search warrant or similar Court order, the circumstances in which confidential patient information may be disclosed to the police without a breach of confidence arising are:
- 94.1 Where the police provide the written consent of the patient, the patient’s legal guardian (where the patient is a minor or mentally incompetent adult) or the patient’s executor (where the patient is deceased) and information is disclosed in accordance with the consent given.
- 94.2 Where disclosure is made pursuant to a statutory protection. For example, the *Firearms Act 1973*. Under that Act, if a medical practitioner is of the opinion that a person is seeking or has sought medical assistance for an injury in which the practitioner believes a firearm or ammunition has been involved, the medical practitioner may inform the Commissioner of Police of that opinion. The medical practitioner may inform the Commissioner notwithstanding any duty of confidentiality. Where the medical practitioner acts in good faith in this regard, no criminal or civil action or remedy will arise.
- 94.3 The disclosure can be justified on the basis of the public interest.
- In the absence of specific statutory protection or appropriate patient consent, health professionals wishing to report a suspected crime, will need to be satisfied the disclosure falls within the public interest exception to the duty of confidentiality (discussed in more detail in section G above).
- It will be a question of judgment in each case whether the gravity of the offence or suspected offence, or the risks to the individual patient or to the public generally of non-disclosure, justifies information about a patient being revealed to relevant authorities in the public interest. The disclosure of a

non-trivial breach of the criminal law will be easier to justify in the public interest than less serious crimes.

It is recommended that advice be sought from Legal & Legislative Services (or, in the case of teaching hospitals, the State Solicitor's Office) before a 'public interest disclosure' is made.

- 95 Disclosure of confidential patient information in response to a summons to produce documents or to give evidence must be made to the Court and not the police.

APPENDIX A

Section 10C of the Child Welfare Act 1947 TEMPLATE SECTION 10C REQUEST FOR INFORMATION (To be typed on the DCD letterhead)

[Insert name and address
of public authority]

Attention: [Insert name of officer responsible for handling 10C requests
on behalf of public authority if known. If not known address letter to the attention of
the "Proper Officer"]

Dear Sirs

**RE: SECTION 10C(3), CHILD WELFARE ACT 1947 – REQUEST FOR INFORMATION
RELATING TO [INSERT FULL NAME AND DATE OF BIRTH OF THE CHILD THE SUBJECT OF
THE SECTION 10C(3) REQUEST]**

I am a [insert title of delegate as listed in the 2003 delegation (e.g., Senior Field Officer) or its
replacement] responsible for the investigation and assessment of allegations of abuse and harm that
have been made in respect of the above-named child.

Either:

The Department for Community Development ("DCD") has instituted care and protection proceedings
in relation to the above-named child pursuant to Section 29 of the *Child Welfare Act 1947* ("CWA").

Or, alternatively:

The Department for Community Development ("DCD") has recently received information giving rise to
concerns about the health, welfare and safety of the above-named child. As a result, DCD is
conducting enquiries to assist it in determining whether the child is someone in need of care and
protection under the CWA.

[If neither of the above paragraphs are applicable, a suitable paragraph will need to be prepared
specific to the circumstances of the case concerned.]

Pursuant to Section 10C of the CWA, the DCD's Director-General may request a 'public authority' as
defined in that section to disclose any information the Director-General considers relevant to the
health, safety or welfare of a child or any class of children, or the performance of functions under the
CWA.

As a delegate of the DCD's Director-General under Section 10B of the CWA, I am authorised to
request 'relevant information' under Section 10C of the CWA on behalf of the DCD's Director-General.
A copy of Sections 10B and 10C of the CWA is **attached** for your information.

I believe that you hold 'relevant information' within the meaning of Section 10C of the CWA.
Consequently, pursuant to Section 10C(3) of the CWA, I formally request from you [Insert clear details
of the information being requested. The information being requested should be sufficiently described
so as to enable the public authority to clearly identify the information being sought. A request made
using vague and imprecise terms will simply result in delay while the public authority seeks
clarification from DCD as to the information sought.].

Please forward the above information to the signatory to this request at the address appearing at the
foot of this letter.

Yours faithfully

[Insert name and title of signatory, e.g., Jo Brown, Senior Field Officer/Social Worker, Moora Office]