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Disclosure of personal information to the Police in NSW: Obligations of Mental Health and other Community Services

1. Background

Recently MHCC were asked by a member for information regarding a person's obligations to disclose personal information to the police in relation to a client who was subject to a community treatment order (CTO), which the client had reportedly breached. A worker was approached by the police inquiring about the client's address, possible whereabouts and other personal information (having received a report that the client was missing and had concerns for their welfare). The client had told the worker that they were safe and well and requested that no personal information be disclosed to police. However, the police officer informed the worker that they could be arrested for hindering a police investigation if they failed to disclose the client's whereabouts and other personal information.

MHCC consider that this matter is one of great interest to our members and wish to assist community run organisations in developing policy and procedures to guide employees and volunteers to respond appropriately to such requests from the police.

MHCC approached the Public Interest Advocacy Centre (PIAC) who was kind enough to furnish us with a detailed legal advice on the matter. This paper is a summary of the advice prepared by PIAC.

2. Summary of advice

PIAC reviewed the relevant obligations in relation to privacy and confidentiality in circumstances when police request personal information, such as a client's whereabouts, from a mental health worker. PIAC also considered in what circumstances a failure to provide information to police may constitute an offence. PIAC considered these issues in circumstances where police are asking for information in relation to a person who: has been reported missing; has breached a CTO; the police have a concern for their safety or welfare; or is suspected of having committed an offence.

In summary:

- All mental health workers, allied health workers and volunteers working in the community have general common law obligations of confidentiality;
- Privacy laws protect the disclosure of personal information without a person's consent;
- Exemptions exist in privacy laws to permit the disclosure of personal information for a purpose other than the reason it was collected;
- The exemptions allow disclosure of personal information to law enforcement agencies in circumstances where:
 - it is necessary to prevent a serious and imminent threat to the life, health or safety of an individual;
 - it would assist in ascertaining the whereabouts of an individual reported as a missing person; or
 - there are reasonable grounds to believe an offence may have been committed;
- These exemptions do not create a positive obligation to disclose information to police in these circumstances;
- In very limited circumstances the police can arrest a person for hindering a police investigation or concealing a crime but a mental health worker is very unlikely to be arrested for these offences for failing to provide information to the police.

Each request by police must be considered on its merits with regards to the particular circumstances and the competing interests and duties.

Scope of advice

This advice has not considered:

- the duty of care that a mental health worker owes to their client in situations when a client may threaten self-harm or suicide;
- the mandatory reporting obligations under the *Children and Young Persons (Care and Protection) Act 1998* (NSW); and
- privacy laws in other states and territories.

This advice has considered current NSW and Federal privacy laws only. Please note that there are current ongoing reviews of Federal and New South Wales privacy law.

3. General obligations of confidentiality

It is generally well established that certain types of relationships include an obligation of confidentiality. In determining whether an obligation of confidentiality is owed, the emphasis is on the circumstances in which the information was obtained rather than any intrinsic value or importance of the information. Duties of confidentiality may also be an express term of a mental health worker's employment contract, a clause in a professional code of ethics or a clause in a contract between a client and a worker. Even in circumstances where there is no express contract between a worker and client a contract may be implied and include a term of confidentiality.

Like medical practitioners, mental health workers owe duties of confidentiality to their clients not to disclose sensitive personal information to others without the client's consent. Indeed the relationship of a counselor or social worker with a client relies on trust that the information disclosed by the client remains confidential.

If a mental health worker were to breach a client's confidentiality, the client may be able to sue in a claim for damages but only if they were able to prove that they have suffered loss as a result of the disclosure. However, any such legal action would be unlikely.

4. State and Federal Privacy laws

There is no general law in Australia that protects a person's right to privacy. However, there are privacy laws in NSW, and Federal laws that govern the disclosure of information by government and non-government organisations. In addition to the obligations under these privacy laws members should ensure their employees and volunteers follow their organisation's own privacy codes of practice and policy.

Generally the legislation imposes obligations on organisations not to disclose personal information, except in certain specified circumstances, such as if a person's life, health or safety is seriously threatened. In such a circumstance a mental health worker is not prevented from disclosing personal or health information to the police under the relevant privacy law. However, the privacy laws do not *require* the mental health worker to disclose such information to the police in those circumstances: it merely exempts them from breaching privacy laws if they do disclose information. If a privacy law has been breached a person can make a complaint to the NSW or Federal Privacy Commissioner.

4.1 Health Records and Information Privacy Act 2002 (NSW)

The *Health Records and Information Privacy Act 2002* (NSW) (**HRIP Act**) contains obligations in relation to the disclosure of health information and personal information. The HRIP Act has broad application and applies to "every organisation that is a health service provider or that collects; holds or uses health information".¹ A "health service provider" includes both private and public sector bodies that provide mental health services, community health services, health education services and welfare services.² Therefore the HRIP Act would apply to the vast majority of members of the MHCC.

The HRIP Act sets out the Health Privacy Principles (**HPPs**), which relate to the collection, access, retention and disclosure of health information by health organisations. Health organisations must comply with the HPPs.

"Personal information" is defined in section 5 of the HRIP Act. It states in part:

(1) In this Act, personal information means information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

"Health information" is defined in section 6 of the HRIP Act. It states, in part, that health information is:

(a) personal information that is information or an opinion about:

- (i) the physical or mental health or a disability (at any time) of an individual, or
- (ii) an individual's express wishes about the future provision of health services to him or her, or
- (iii) a health service provided, or to be provided, to an individual, or

(b) other personal information collected to provide, or in providing, a health service, or ...

¹ Section 11 *Health Records and Information Privacy Act 2002* (NSW).

² Section 4 *Health Records and Information Privacy Act 2002* (NSW).

HPP 11 relates to the disclosure of health information, which could include a person's address or contact details. It provides that an organisation that holds health information must not disclose the information for another purpose (a secondary purpose) other than the purpose for which it was collected (primary purpose) except in certain circumstances. The relevant exemptions to the general rule on disclosure are discussed below.

4.1.1 Serious threat to health or welfare of person

HPP 11(1) (c) provides that an organisation can disclose an individual's health information for a secondary purpose if it is necessary for the individual's, or another person's, life, health or safety or for the public's health or safety. It states:

the disclosure of the information for the secondary purpose is reasonably believed by the organisation to be necessary to lessen or prevent:

- (i) a serious and imminent threat to the life, health or safety of the individual or another person, or
- (ii) a serious threat to public health or public safety, or...

The provision does not limit who the disclosure can be made to, so would include any disclosure to the police. The requirement is for a serious and imminent threat, not a mere anticipated threat. It is important to note that the exemption applies to the reasonable belief of the organisation, not the police, as to the disclosure being necessary. For example, if a police officer approached a mental health worker asking for an individual's current location because they had concerns about the person's health or safety, the mental health worker would need to make their own assessment of whether the disclosure of the individual's current location was necessary to lessen or prevent a serious or imminent threat before deciding whether to disclose the information.

In a practical sense it may be difficult for a worker to make their own assessment, as the police may be unwilling to divulge the basis of their concerns. If disclosure was made in this situation it may be reasonably arguable by the worker, in defence of any privacy breach complaint, that the police's concern led them to believe there were reasonable grounds to believe that the disclosure was necessary.

Moreover, in such a circumstance there may be other duties on the mental health worker to disclose such information if the individual's health or safety was at risk.

Further information, including a link to the full text of the Act, is available at:
http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/pages/PNSW_03_hripact

4.1.2 Missing person

HPP 11(1) (h) allows disclosure of health information about an individual to a law enforcement agency in circumstances where a person has been reported to police as a missing person. It states:

the disclosure of the information for the secondary purpose is to a *law enforcement agency* (or such other person or organisation as may be prescribed by the regulations) for the purposes of ascertaining the whereabouts of an individual who has been reported to a police officer as a missing person, or ...
[emphasis added]

For example, if a mental health worker were approached by police to ascertain if they knew of the whereabouts of an individual who had been reported missing to police, the mental health worker would not be in breach of HPP 11 if they disclosed information to the police in relation to the person's last known location. However it does not impose a positive obligation on the mental health worker to make such a disclosure.

4.1.3 Law enforcement

HPP 11(1) (j) allows for the disclosure of health information about an individual for a secondary purpose in circumstances where there are reasonable grounds to believe that an offence may have been committed. It states:

the disclosure of the information for the secondary purpose is reasonably necessary for the exercise of law enforcement functions by law enforcement agencies in circumstances where there are reasonable grounds to believe that an offence may have been, or may be, committed, or...

This provision does not state whether it is the organisation or the police's belief (based on reasonable grounds) that an offence may have been committed. The provision also does not limit who the disclosure can be made to, so it would authorise disclosure to law enforcement agencies, including the police. Again, the provision does not impose a positive obligation on a mental health worker to disclose information in such circumstances, but merely permits such a disclosure.

4.2 Privacy and Personal Information Protection Act 1998 (NSW)

The *Privacy and Personal Information Protection Act 1998* (NSW) (**NSW Privacy Act**) applies to public sector agencies. "Public sector agencies" include government departments, statutory bodies, local government authorities and councils, and public hospitals, but does not include state owned corporations.³ Given that most members of the MHCC are non-government organisations, it is unlikely the NSW Privacy Act will cover them. However some organisations that receive state funding may be categorised as a public sector agency for the purposes of the NSW Privacy Act.

The NSW Privacy Act creates a regime for privacy protection by establishing the Information Protection Principles (**IPPs**). The IPPs set out how public sector agencies should deal with personal information. "Personal information" is defined in section 4 of the NSW Privacy Act. It states, in part:

(1) In this Act, **personal information** means information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

Section 18 of the NSW Privacy Act contains the IPP in relation to the disclosure of personal information. It provides that a public sector agency that holds personal information must not disclose the information. The exemptions on disclosure include: in circumstances where there is a serious and imminent threat to the life and health of the individual or another person;⁴ disclosure to a law enforcement agency for the purposes of ascertaining the whereabouts of an individual who has been reported to the police as a missing person;⁵ and in circumstances where it is reasonably necessary in order to investigate an offence where there are reasonable grounds to believe that an offence has been committed.⁶

Further information, including a link to the full text of the Act, is available at:
http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/pages/pnsw_03_ppipact

³ Section 3 of the *Privacy and Personal Information Protection Act 1998* (NSW).

⁴ Section 18(1)(c) of the *Privacy and Personal Information Protection Act 1998* (NSW).

⁵ Section 23(5)(b) of the *Privacy and Personal Information Protection Act 1998* (NSW).

⁶ Section 23(5)(d)(ii) of the *Privacy and Personal Information Protection Act 1998* (NSW).

4.3 Privacy Act 1988 (Cth)

The *Privacy Act 1988* (Cth) (**Federal Privacy Act**) applies to: federal government agencies; non-government organisations and businesses whose annual turnover is more than \$3 million; private health service providers and organisations; and organisations contracted to an Australian government agency.

The Federal Privacy Act establishes the Information Privacy Principles (**IPPs**), which only apply to government agencies. The Federal Privacy Act also creates the National Privacy Principles (**NPPs**), which apply more broadly than the IPPs. All organisations regulated by the Act must comply with the NPPs.

NPP 2 provides that an organisation must not use or disclose personal information about an individual for a secondary purpose. There are a number of exceptions to the general principle of use and disclosure, including relevantly, if the organisation reasonably believes that the use or disclosure is necessary to prevent a serious and imminent threat to an individual's life, health or safety;⁷ and if the organisation reasonably believes that the use or disclosure is reasonably necessary for the prevention, detection, investigation or prosecution or punishment of criminal offences.⁸

If a worker discloses information in relation to a criminal offence then they must make a written note of the disclosure.⁹ Unlike the NSW Privacy Act and the HRIP Act there is no exemption in relation to disclosing personal information in circumstances when a person has been reported as missing to the police. Although in some circumstances, it may be arguable that the disclosure of information about a missing person falls within the exemption for a serious and imminent threat to an individual's life, health or safety.

The full text of the Act is available at:

<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current%5Cbytitle/2E8A7BC1A7F85044CA2576EE00136FD3?OpenDocument&mostrecent=1>

4.4 Mental Health Act 2007 (NSW)

Section 189 of the *Mental Health Act 2007* (NSW) provides that a person must not disclose information obtained in connection with the administration or execution of the Act except in certain circumstances. Relevantly subsection 189(1) (d) provides an exemption to the disclosure of information for purposes in legal proceedings under the *Mental Health Act 2007*(NSW), for example proceedings in the Mental Health Review Tribunal for a CTO. However, this section applies only to information obtained in connection with the administration or execution of the *Mental Health Act 2007* (NSW). It is therefore unlikely to apply to the majority of the members of the MHCC whose staff care for consumers in the community, and not in a mental health facility under the Mental Health Act.

The full text of the Act is available at:

<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+8+2007+cd+0+N>

4.5 Obligations for consumer/volunteer run organisations

⁷ Schedule 3, clause 2.1 (e)(i) of the *Privacy Act 1988* (Cth).

⁸ Schedule 3, clause 2.1 (h)(i) of the *Privacy Act 1988* (Cth).

⁹ Schedule 3, clause 2.2 of the *Privacy Act 1988* (Cth).

All members are bound by duties of confidentiality, however not all members are covered by the same privacy laws. If a member provides a health service or collects, holds or uses health information, it will be covered by the HRIP Act (see 4.1 above). If the member receives state funding they may be covered by the NSW Privacy Act (4.2 above). If the member is contracted by an Australian Government Agency, e.g. Jobs Network, or have an annual turnover greater than \$3m then they will be covered by the Federal Privacy Act (4.3 above). Some MHCC members are consumer/ volunteer run community services that may not fall under the privacy laws discussed above. However, such members may still have knowledge of personal information about people and need to consider in what circumstances they disclose such information.

The NSW Privacy Commissioner can investigate complaints about organisations which are not covered by the HRIP Act or the NSW Privacy Act. To guide the investigation of such complaints, Privacy NSW has adopted the Data Protection Principles (**DPPs**). The DPPs are not legally binding, but are a best practice privacy guide for organisations that are not regulated by specific privacy legislation. For community/volunteer run organisation that is not regulated by the above privacy laws, it would be prudent to follow the principles contained in the DPPs as a guide to when the disclosure of personal information is permitted.

A full copy of the DPPs is available at:

http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/pages/PNSW_03_dpds

5 If a client has committed a crime – obligations to provide information to the police

Generally, there is no common law duty that *requires* a person to disclose information to police in relation to a client's past or intended criminal activity. However, there are three relevant provisions of the *Crimes Act 1990* (NSW) (**Crimes Act**) whereby a refusal by a mental health worker to provide information to police may constitute a crime. A failure to provide information in any of these circumstances would be unlikely to constitute an offence and a mental health worker would not be under an obligation to cooperate with the police.

5.1 Hindering police in execution of their duty

Section 546C of the Crimes Act creates an offence of hindering police in execution of their duty. The penalty is 12 months imprisonment or a fine of 10 penalty units (\$1,100), or both. The person must intend to impede the police officer, making it substantially more difficult for them to perform the task they were engaged in.

This offence is commonly committed when a police officer is arresting one person and a third person steps in between the police officer and the person being arrested and interferes or blocks the police officer executing the arrest. Running away from a police officer has not been regarded by the courts as hindering police within the meaning of section 546C.¹⁰

It is unlikely that a mental health worker would be convicted of an offence under this section for failing to provide contact information of a client to police. The provision seems more directed to circumstances where a person physically interferes with an arrest. It seems very unlikely that a person could be convicted for failing to provide the police information about a person's whereabouts in circumstances where they are making inquiries about a person who has been reported missing, breached a CTO, or for who the police have a concern for their safety.

¹⁰ *Taufahema v R* [2006] NSWCCA 152.

5.2 Hindering a police investigation

Section 315(1) of the Crimes Act creates an offence to hinder a police investigation. It provides:

- (1) A person who does anything in any way to hinder:
 - (a) the investigation of a serious indictable offence committed by another person, or
 - (b) the discovery of evidence concerning a serious indictable offence committed by another person, or
 - (c) the apprehension of another person who has committed a serious indictable offence, is liable to imprisonment for 7 years.

A “serious indictable offence” is an offence punishable by imprisonment for a term of life or five years or more. By way of example a serious indictable offence would include intent to cause grievous bodily harm, indecent assault, malicious damage, supplying a prohibited drug and stealing (even if the goods are of negligible value). It does not include offensive language, possession of a drug or possession of a knife. It is important to note that it is not an offence to breach a CTO made under the *Mental Health Act 2007*(NSW). Section 313 provides that it is not necessary for the person to know that the offence was a serious indictable offence.

There is an exemption under s 315(3) of the Crimes Act that provides that it is not an offence under the section merely to refuse or fail to divulge information to police. The person must intend to hinder the investigation of a serious indictable offence committed by another person e.g. giving a false statement to police. The case law also seems to indicate that the person must have some actual knowledge of the events surrounding the offence that was committed by the other person, not merely knowledge of the person’s whereabouts.¹¹

By way of example, if a mental health worker was questioned by police and asked for the location of a client the police suspected of having breached a CTO it would not be an offence to fail to provide such information to the police, as breaching a CTO is not an offence. Also if the police requested information about a client’s whereabouts on a particular day, because they reasonably believed the client was involved in a robbery on that day and the mental health worker refused to disclose information about the client’s whereabouts (and did not know anything about the alleged robbery) it would not be an offence of hindering a police investigation.

5.3 Concealing a serious offence

Section 316 of the Crimes Act makes it an offence to conceal a serious offence and is punishable by up to two years’ imprisonment. Section 316 applies if:

- a serious indictable offence has been committed; and
- a person knows or believes that it has been committed; and
- a person has information that might assist in the apprehension, prosecution or conviction of the offender; and
- the person fails, without reasonable excuse, to bring the information to the attention of the police or other appropriate authority.

The Crimes Act does not define what amounts to a “reasonable excuse”, but it arguably extends to a need to protect a mental health worker’s confidentiality and trust with a client. Moreover, there are special protections in section 316(4) for professionals, including mental health professionals. Under subsection 316(4) the consent of the Attorney General is needed for a prosecution if the knowledge or belief that an offence has been committed was formed or obtained from information in the course of practising or following a profession, which includes, medical practitioners, psychologists, nurses and social workers.

Consequently, it is extremely unlikely that a prosecution would be commenced against a mental health worker under section 316 for concealing a serious offence committed by a client.

¹¹ See *R v El-Zeyat* [2002] NSWCCA 138.

6 Summary

Privacy laws in Australia and NSW limit the lawful disclosure of personal information without a person's consent. Generally, a client's personal information cannot be released by a mental health worker to another person, including the police. However, privacy laws do allow for disclosure of personal information in limited circumstances, including relevantly, if a person's health or safety is in danger; if the person has been reported missing; and in circumstances when a criminal offence is reasonably suspected of having been committed. Privacy laws may not protect the release of personal information by a mental health worker to police outside these circumstances.

A key feature of a mental health worker's relationship with their client is confidentiality. A breach of confidentiality in some circumstances might seriously erode the client's trust in the mental health worker and therefore any disclosure must be considered carefully. Each police request for personal information of a client must be considered on its merits and in the particular circumstances.

If a mental health worker is asked by police to disclose personal information, the worker should ask police for the reason they are requesting the information, e.g. to find a person reported missing. They should also ask the police on what information they have relied on to make their request, e.g. the client's family reported the person missing on a certain date, although police may be reluctant to disclose the source of such information.

Whether a mental health worker discloses information to police will depend on a balancing of competing interests and duties. Generally, there is no obligation to disclose information to the police. However in some circumstances there may be sufficient reason to warrant disclosure of information to the police and such disclosure may be in the client's best interests, e.g. if there is a serious concern about the person's health or safety. If a disclosure were made in those circumstances then a mental health worker would be protected under privacy laws for breaching the client's privacy. In other circumstances, e.g. the police are inquiring about the client's whereabouts because they suspect the person committed an offence, the detrimental effect of such a disclosure to the police on the relationship with the client would most likely be sufficient to justify non-disclosure.

In most circumstances a failure to disclose information about a person's whereabouts to the police would not constitute an offence. Concerns about a mental health worker being arrested for hindering police in the execution of their duties, hindering a police investigation, or concealing a serious offence are misplaced as it is unlikely that a mental health worker would be arrested by police for refusing to provide information in relation to a person's whereabouts.

For any further information regarding this matter please contact Corinne Henderson, Senior Policy Officer, at corinne@mhcc.org.au