# Confidentiality under the Mental Health Act 1986

Program management circular

## Key message

Section 120A of the Mental Health Act is the principal law regulating the **disclosure** of health information by mental health services.

The Health Records Act is the principal law regulating the **collection** and **use** of health information by mental health services.

## 1. Purpose

To provide information about the law and clinical policy requirements concerning:

- the operation of the confidentiality provisions in the *Mental Health Act 1986* (the Act)
- the relationship between the confidentiality provisions in the Act and the *Health Records Act 2001*

## 2. Introduction

The obligation to keep consumer information confidential is longstanding and well understood by clinicians and consumers. The essence of the obligation is to protect health information from unauthorised use or disclosure by placing a responsibility on the individual who holds the information to keep it confidential. Confidentiality is enforced by both legislation and professional codes of conduct.

Section 120A of the Act is the principal law that regulates the confidentiality of information about consumers of mental health services. The provision has been regularly amended over the years and has become increasingly complex. The most recent changes have been to improve its consistency with the Health Records Act.

This guideline has been developed to explain the operation of s. 120A and to explain its interaction with the Health Records Act. A quick reference guide summarising the legal grounds for disclosing information is included in appendix 1.

## 3. Scope of s. 120A

### 3.1 Who is bound by s. 120A?

Section 120A applies to all current and former employees, contractors, proprietors, owners and board members of a 'relevant psychiatric service' (see definition below), as well as the 'relevant psychiatric service' itself. They are collectively referred to in s. 120A as a 'relevant person'.

#### Relevant psychiatric service

A 'relevant psychiatric service' is an organisation that provides one or more of the following services:

- An approved mental health service

  An approved mental health service is any service or premises that has been proclaimed by the Governor in Council under s. 94 of the Act as a place at which treatment can be provided to patients under the Act or is subject to an emergency declaration by the Secretary to the Department of Human Services under s. 94A.

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The proclamation or declaration is subsequently published in the *Victorian Government Gazette* (hence the term 'gazetted services'). Typically, public hospitals that have an acute psychiatric in-patient unit are proclaimed as approved mental health services.

- A child and adolescent psychiatry service
- An agency providing community support services

  Community support services are defined in s. 98 of the Act to be services funded by the Secretary to the Department of Human Services to provide care or support intended to assist people with a mental disorder to live, work and participate in the community. It includes Psychiatric Disability and Rehabilitation Support Services (PDRSS).
- Any premises licensed under s. 75

  These are premises licensed to perform electroconvulsive therapy and include both public and private facilities.
- A hospital admitting and caring for people with a mental disorder

  This includes public, denominational and private hospitals admitting and caring for people with a mental disorder, whether the person has been admitted to a psychiatric unit or another part of the hospital, for example an emergency department or a medical/surgical unit managing a person with a mental disorder.
- Any mental health service of a community health centre
- A psychiatric out-patient clinic
- A community mental health service.

Most public and private mental health services are therefore covered by s. 120A. Private practitioners, such as private psychiatrists and general practitioners, are not covered by the provision. The privacy laws covering these practitioners are the Health Records Act and the Commonwealth Privacy Act 1988.

## 3.2 What information does s. 120A cover?

Section 120A covers any information acquired by a 'relevant person' through their work at a 'relevant psychiatric service' that identifies a consumer or from which a consumer could be identified. It does not cover information that has been de-identified or de-identified aggregated data that is used for planning, funding, research and other purposes.[1]

## 3.3 What does s. 120A do?

Section 120A broadly prohibits a 'relevant person' from disclosing identified mental health information about current and former consumers of 'relevant psychiatric services'.

Section 120A also prescribes general and specific circumstances when identified consumer information may be disclosed to external organisations and individuals. These are discussed in detail below.

1. Sometimes aggregated data refers to small populations of consumers or populations within small geographical locations. If a person's demographic details are sufficiently unique within a small population as to allow the person to be identified within that population, then s. 120A will apply.

# 4. What is the relationship between s. 120A and the Health Records Act?

The Health Records Act establishes a comprehensive regime for the protection of health information held by health service providers and other organisations in Victoria (both public and private) and creates an enforceable right of access to the health information. The Health Records Act does not override other legislative regimes for confidentiality or access (for example, the *Freedom of Information Act 1982*), but rather complements and supplements those regimes.

Section 7 of the Health Records Act provides that where a provision under the Health Records Act is inconsistent with a provision made under another Act, that other provision takes precedence. Section 120A is such a law and is considered to be the principal law regulating the **disclosure** of information by 'relevant psychiatric services' and takes precedence over the Health Records Act for the purposes of **disclosure**.

However, s. 120A does not govern the **collection** or **use** of health information by 'relevant psychiatric services' (with the one exception of information stored in the statewide mental health client information management system known as the ODS[2]). This means that the Health Records Act should be taken as the principal law regulating the **collection** and **use** of health information by 'relevant persons' and 'relevant psychiatric services'.

# 5. Disclosure of information under s. 120A

## 5.1 General grounds for disclosure

The general circumstances when disclosure may be permitted are when it is necessary to:

- Carry out functions or exercise powers under the Mental Health Act or any other Act. For example:
  - Section 80 of the Act requires the holder of an electroconvulsive therapy licence to disclose information about the performance of electroconvulsive therapy to the Department of Human Services every month.
  - Under s. 106 of the Act, the Chief Psychiatrist or an authorised officer may visit mental health services to inquire into service standards, the adequacy of treatment and the welfare of consumers. They may also inspect or require the production of any document or medical record relating to a consumer.
  - Section 106A of the Act requires the authorised psychiatrist of each approved mental health service or the person in charge of any other psychiatric service to report the death of a consumer that is a 'reportable death'[3] to the Chief Psychiatrist.
  - Information may be given to a member of the police force or an ambulance officer in order to provide safe transport under s.9B.
  - Under Division 5 of the Act, community visitors are required to visit mental health services and may inquire into the adequacy of services, standards of facilities and complaints by consumers. For these purposes, community visitors may inspect any document or medical record relating to a consumer if the consumer has given consent in writing.

2. The one exception is s. 120A(3B), which regulates the collection and use of information from the Operational Data Store (ODS). This is separately discussed in chapter 5.7.

3. 'Reportable death' is defined in s. 3 of the *Coroners Act 1985*.

- Give any information expressly authorised or permitted under the Mental Health Act or any other Act. For example:
  - The Freedom of Information Act and the Health Records Act give people a right of access to information held about themselves.
  - Section 13 of the *Coroners Act 1985* requires that reportable deaths be reported to a Coroner. Section 26 of the Coroners Act provides that a Coroner may, if it is necessary for an investigation, enter and inspect premises, take a copy of any document and take possession of anything that is relevant to the investigation.
  - Under s. 12AE, a guardian of a consumer who has been made an involuntary patient must be notified of this fact and the reasons for it.
  - Under s. 73(3)(b), all reasonable efforts must be made to notify a consumer's guardian (if any) or primary carer if an involuntary patient is to be given involuntary electroconvulsive therapy with the consent of the authorised psychiatrist.

## 5.2 Specific grounds for disclosure

Section 120A(3) prescribes a number of specific circumstances when mental health information may be disclosed to external organisations and individuals. These are discussed in detail below. It is important to note that these provisions **permit** the disclosure of information, but do not **require** it. The decision to disclose information or not to disclose information is left to the discretion of the individual clinician or staff member, however, clinicians might consider discussing the issue with a senior clinician before making a decision. Relevant factors to be taken into account when making the decision include:

- The purpose for disclosing the information
  - Why does the receiving organisation need the information; is it necessary for one of its functions or activities; can the purpose be served without disclosing the information or by giving de-identified information?
- The amount of information necessary to serve the purpose
  - Only the minimum amount of information should be disclosed to serve the purpose.
- The best interests of the consumer, including the views of the consumer where appropriate
  - The disclosure of information should generally be in the best interests of the consumer. It is good clinical practice to seek the consent of the consumer before disclosing information wherever reasonable and practicable. However, there will be circumstances when the interests of the community or other individuals outweigh the interests of the consumer and information may be disclosed without consulting the consumer, for example, when there is a serious threat to the public health, safety or welfare.
- Other relevant legislation, guidelines and professional and ethical requirements.

See also chapter 8 for details about the *Victorian Charter of Human Rights and Responsibilities Act 2006*, which provides a new rights-based framework within which these decisions are also to be made.

## 5.3 Disclosure with consent

Section 120A(3)(a) permits the disclosure of information with the consent of the consumer. There are five key elements to obtaining informed consent: the consumer must have capacity to give consent, the consent must be informed, it must be freely given, it must be specific and it must be current.

Consent may be express or implied. Express consent is unequivocal and does not require any inference on the part of the 'relevant person'. It should be the clear expression of the consumer's wishes, given in response to a choice about how their information is to be handled. Implied consent should only be relied upon where that consent can be confidently and reasonably inferred through the actions of the consumer.

Consent may be given orally or in writing. In either case, the 'relevant person' should be able to demonstrate that the five elements of consent have been met. If seeking oral consent, the 'relevant person' should make an entry in the consumer's clinical record with sufficient information to show the consent is valid.

Where a consumer has died, the 'senior available next of kin'[4] may give consent to disclosure of information.

## 5.4 Disclosure to a guardian, family member or primary carer

Families and carers play vital roles in supporting people with serious mental illness. They are important partners with mental health services in improving the health and wellbeing of the people they care for.[5]

Clinicians should work closely with consumers and carers to identify and meet the specific information and education needs of the carers. This information may relate to treatment and management options, how to respond to disturbing behaviours, how to access practical assistance and generally assisting family members and carers in dealing with the illness. The amount of information provided in each individual case will depend on the extent the consumer wishes family members and carers to be involved.

Generally, clinicians should seek the consent of the consumer to disclose information to a guardian, family member or primary carer and this subject should be broached as soon as practicable in the treating relationship. Most consumers will agree to the giving of information to carers, guardians and immediate family members if time is taken to discuss the reasons and the benefits, although they may wish to place limits on the disclosure of some information, particularly sensitive information. These wishes should generally be respected.

However, if the consumer does not give consent, s. 120A(3)(ca) permits the disclosure of information to a guardian, family member or primary carer by a member of the medical staff or other prescribed clinical staff (registered nurses, registered psychologists, social workers, occupational therapists)[6] employed by a 'relevant psychiatric service' if:

- the information is reasonably required for the ongoing care of the person
  and
- the guardian, family member or primary carer will be involved in providing that care.

Where a clinician decides to disclose information to family members, guardians or carers under this provision, it would be good clinical practice to inform the consumer. Generally, only where this would pose a risk to the health or welfare of any individual should the consumer not be informed.

For people not involved in providing ongoing care to a consumer, information may only be communicated in general terms as provided for under s. 120A(3)(c)(i) (refer chapter 5.5).

### 5.4.1 Who may receive the information?

Section 120A(3)(ca) permits information to be disclosed to three groups of people:

- Guardians
  This includes the legal guardian of a child appointed under the *Children, Youth and Families Act 2005*, guardians appointed by the Victorian Civil and Administrative Tribunal under the *Guardianship and Administration Act 1986* and enduring guardians appointed under the Guardianship and Administration Act.

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4. 'Senior available next of kin' has the same meaning as in the *Human Tissue Act 1982*.

5. Information about involving family members and carers in the treatment and care of consumers is provided in the Chief Psychiatrist's Guideline, *Working together with families and carers* (Department of Human Services, April 2005). The guideline is available at www.health.vic.gov.au/mentalhealth/cpg

6. See the Mental Health Regulations 2008 for the full description of the prescribed class.

- Family members
- Primary carers

  These are people who are responsible for providing support or care to a consumer, but do not include people who are employed or paid to care for a consumer (although this does not exclude people who are in receipt of the carer support allowance).

### 5.4.2 What information might be required for ongoing care?

The type of information to be disclosed will depend on the individual circumstances of each consumer. Section 120A(3)(ca) only allows for the disclosure of information that is reasonably required for the ongoing care of a consumer. This is a clinical decision to be made by the individual clinician. The clinician should take into account the purpose for disclosing the information and only disclose sufficient information to meet that purpose. Individual clinicians are encouraged to discuss the information they plan to disclose with a more senior colleague.

### 5.4.3 Is the person involved in providing the ongoing care?

To be able to receive information under this provision, a person must fall within one of the above groups and be involved in providing ongoing care to the consumer. If the person is not involved in the care of the consumer then information cannot be disclosed under this provision. However, this should not be interpreted too narrowly. For example, family members and carers do not need to be living with the person in order to be involved in providing care. Care provision is broader than cohabitation and information should not be withheld on the basis that the consumer is no longer living with a family member or carer. Similarly, guardians may not be directly supplying care or accommodating a represented person. A guardian's role is to access services for a represented person and to monitor their provision. In this sense, providing ongoing care involves making arrangements for that care as well as direct care-giving.

### 5.4.4 Treatment plans

Section 19A of the Act requires that every patient[7] under the Act must have a treatment plan.[8] The Act stipulates that certain matters must be taken into account by the authorised psychiatrist when a treatment plan is prepared, reviewed or revised.[9] These include the wishes of any guardian, family member or primary carer who is involved in providing ongoing care or support to the patient, unless the patient objects. The role of families and carers should be discussed with the patient as early as possible to determine the extent to which their wishes should be taken into account. If a patient objects to the wishes of any guardian, family member or primary carer being taken into account, this does not mean that these people should get no information about the treatment plan. The decision about disclosing information is separate to decisions about seeking the wishes of family members and carers and is governed by s. 120A(3)(ca) as described above.

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7. The term 'patient' refers to involuntary, security and forensic patients under the Mental Health Act. The term is used here to be consistent with the language in the Act.

8. Further guidance about treatment plans is provided in the Chief Psychiatrist's Guideline, *Treatment plans under the Mental Health Act 1986,* available at www.health.vic.gov.au/chiefpsychiatrist/treatment-plan

9. Refer s. 19A(2)(b) of the Mental Health Act.

### 5.4.5 Further grounds for disclosing information to guardians and primary carers

Section 12AE of the Act provides that a guardian of a consumer who becomes an involuntary patient under the Act must be notified that the person has become an involuntary patient and of the grounds for it. The purpose of this provision is to enable the guardian to provide support and advocacy on behalf of the represented person.

Section 73(3)(b) provides that where a patient is to have involuntary electroconvulsive therapy with the consent of the authorised psychiatrist, all reasonable efforts must be made to notify the patient's guardian or primary carer about the proposed electroconvulsive therapy. The purpose of this provision is also to enable the guardian or primary carer to provide support and advocacy on behalf of the represented person.

## 5.5 Disclosure in general terms

Section 120A(3)(c) permits the disclosure of information about the condition of a current consumer where the information is communicated in general terms. Only very limited information may be disclosed under this exception to confidentiality. For example, it would extend to telling a telephone caller that an inpatient is well enough to receive visitors or the disclosure of limited information, such as diagnosis, during family psycho-education.

## 5.6 Disclosure for further treatment

Section 120A(3)(e)(i) permits the disclosure of information where this is required for the 'further treatment' of a consumer with a mental disorder.[10] The definition of treatment in s. 3 of the Act is wider than the usual concept of 'medical treatment'. It includes the provision of professional services to remedy a mental disorder or to lessen the ill effects or the pain and suffering caused by the mental disorder.

The purpose of this exception is to facilitate continuity of treatment between different agencies or services that share a common consumer. Examples include the disclosure of information to a general practitioner who is supervising the treatment of a consumer subject to a community treatment order and the disclosure of information to an organisation providing psychiatric disability and rehabilitation support services (PDRSS) to a consumer.

Only information that is necessary for the continuing treatment of the consumer's mental disorder should be disclosed under this exception. In particular, discharge summaries should not be routinely sent to general practitioners or other service providers unless the consumer consents or the requirements of s. 120A(3)(e)(i) are met.

Consideration should always be given to seeking the consumer's consent for the disclosure of information. Most consumers will agree to the giving of information to other treating clinicians or services if time is taken to discuss the reasons and the benefits, although they may wish to place limits on the disclosure of some information, particularly sensitive information. These wishes should generally be respected. Where a clinician decides to disclose information to another clinician or service under this provision, it would be good clinical practice to inform the consumer. Generally, only where this would pose a risk to the health or welfare of any individual should the consumer not be informed.

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10. Section 120A(3)(e)(i) only applies to the disclosure of information for further treatment to external organisations or practitioners. Note that under s. 120A(2B), the giving and sharing of information between employees of a 'relevant psychiatric service' to provide treatment to an individual consumer, including the sharing of information between inpatient and community-based clinicians of the same service, is regulated by the Health Privacy Principles of the Health Records Act.

## 5.7 Information sharing through the CMI/ODS

### 5.7.1 Storing information in the CMI/ODS[11]

Section 120A(3)(e)(ii) permits the sharing of information between 'public sector mental health services' [12], by means of an electronic records system established and maintained by the Secretary to the Department of Human Services for the purpose of providing treatment to consumers.

The Operational Data Store (ODS) is the principal electronic records system regulated by s. 120A(3)(e)(ii). The ODS was developed by the Department of Human Services to allow sharing of consumer information between public sector mental health services to promote continuity of treatment. The client enquiry function of the CMI allows authorised personnel to access the ODS to identify any previous service usage history and other limited information about an individual consumer. This system facilitates the provision of safe and effective treatment to consumers who may not be able to consent to that treatment. The ODS also permits services to identify whether a consumer has an existing legal status under the Act. This is necessary to ensure that the legal basis for providing treatment is clear at all times.

The effect of s. 120A(3)(e)(ii) is to authorise employees of public sector mental health services to enter information in the CMI in the knowledge that some information will also be stored in the ODS and other services may collect and use that information from the ODS to provide treatment to a consumer. This means there is no requirement to seek consent for a consumer to be registered in the CMI or for information about a registered consumer to be stored in the CMI or the ODS, regardless of whether the consumer is receiving services involuntarily or on a voluntary basis.

However, health information must be collected in accordance with Health Privacy Principle (HPP) 1 of the Health Records Act. Specifically, HPP 1.4 provides that when a mental health service collects information from a consumer, it must take steps that are reasonable in the circumstances to ensure that the consumer is aware of the following matters:

- The name of the service and how to contact it
- The fact that the consumer is able to gain access to the information, for example under the Freedom of Information Act
- The purpose for which the information is collected
- To whom (or the types of individuals to which) the service usually discloses information of that kind
- Any law that requires the particular information to be collected
- The main consequences (if any) for the consumer if all or part of the information is not provided.

In accordance with HPP 1.4, public sector mental health services should make consumers generally aware that information will be stored in the CMI/ODS (in addition to the paper-based clinical record) and that this information will be available to other public sector mental health services if those services require the information to provide treatment to the consumer. As discussed above, consumers cannot refuse to have their information stored in the CMI/ODS.

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11. The CMI/ODS (also known as RAPID) is the statewide mental health client information management system. The client management interface (CMI) is the local mental health information component and the operational data store (ODS) is the statewide component. The ODS draws information from each CMI and also allocates the unique mental health statewide patient number when a consumer is first registered in the system.

12. A 'public sector mental health service' is a public hospital, denominational hospital or privately-operated hospital within the meaning of the *Health Services Act 1988* that is funded by the Secretary to the Department of Human Services to provide public mental health services. Typically, these hospitals provide public sector mental health services through an 'area mental health service'. Only public sector mental health services have access to the CMI/ODS. Private hospitals, psychiatric disability rehabilitation support services (PDRSS) and private practitioners do not have access to the CMI/ODS.

### 5.7.2 Accessing information from the ODS

Section 120A(3B) regulates the collection and use of information from the ODS. An employee of a public sector mental health service may collect and use information about a consumer from the ODS if it is necessary to enable the treatment of the consumer by the public sector mental health service.

The client enquiry function of the CMI must not be used to search the ODS for any other purpose, for example browsing or research, even where the research proposal has been approved by an ethics committee. It is an offence under the Act for a person to access the ODS except as permitted under s. 120A(3B).[13]

The Chief Psychiatrist, the Secretary to the Department of Human Services, the Mental Health Review Board and the Forensic Leave Panel can access and use information in the ODS where it is necessary for the performance of statutory powers, functions or duties.

### 5.7.3 Secondary uses of information collected from the ODS

Information that has been collected from the ODS to enable the treatment of a consumer (in accordance with s. 120A(3B), (refer chapter 5.7.2) will usually be downloaded and stored in the local Client Management Interface (CMI) at the public sector mental health service. Some of this information may also be transcribed to paper-based records, such as the clinical record of a consumer.

Further use of this information, whether it is in the CMI or in paper-based records, is governed by s. 120A(3B)(ab). This provision permits an employee of a public sector mental health service to use the information for a secondary purpose if it is necessary for the performance of the employee’s duties and functions within the public sector mental heath service and the use is in accordance with Health Privacy Principle (HPP) 2 of the Health Records Act. HPP 2 envisages a number of secondary purposes for information, including further treatment (HPP 2.2(e)), quality improvement activities (HPP 2.2(f)) and research (HPP 2.2(g)).

It is important to note that this regulation of the secondary use of information stored in the CMI only applies to information that has been drawn down from the ODS in accordance with s. 120A(3B). The Health Records Act is the principal law regulating the use of information in the CMI that has been collected by a ‘relevant psychiatric service’ from other sources, for example, directly from the consumer or from other health service providers.

## 5.8 Disclosure in accordance with the Health Privacy Principles

### 5.8.1 Introduction

Section 120A(3)(ea) permits the disclosure of information as described in Health Privacy Principles (HPP) 2.2(a), 2.2(f), 2.2(h), 2.2(k), 2.2(l) or 2.5 of the Health Records Act. Section 120A(3)(ea) was inserted into the Act in order to improve consistency with the Health Records Act.

As noted earlier, the principal law regulating **disclosure** of health information by a ‘relevant psychiatric service’ is s. 120A of the Act. On this basis, HPP 2 by itself does not apply to the **disclosure** of health information by a ‘relevant psychiatric service’. Inserting the listed Health Privacy Principles into s. 120A(3)(ea) ensures that these exceptions apply to a ‘relevant psychiatric service’ for the purposes of **disclosure** as well as **use**. Each of the listed exceptions is discussed below.

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13. In addition to the legislative penalties, access to the CMI/ODS within public sector mental health services is limited to authorised personnel by the use of security measures such as passwords. Authorised personnel are granted different levels of access depending on their responsibilities.

### 5.8.2 HPP 2.2(a): Disclosure for a related purpose

HPP 2.2(a) permits the disclosure of information for a secondary purpose if the secondary purpose is directly related to the primary purpose and the consumer would reasonably expect the service to disclose the information for the secondary purpose. A 'related' purpose must be directly connected or associated with the primary purpose of collection. When the information was collected the person does not need to have been specifically told that it would be disclosed for the related purpose, but they should reasonably expect the disclosure to occur. If the disclosure is reasonably expected, there is no requirement to seek consent. For example, if a consumer has a blood test to monitor blood serum levels of their medication they will expect some sharing of information between the treating mental health service and the pathology company undertaking the blood testing.

### 5.8.3 HPP 2.2(f): Disclosure for management purposes

HPP 2.2(f) permits the disclosure of information for the purposes of activities such as funding, management, planning, monitoring, improvement, quality assurance or evaluation of health services and training in limited circumstances.

When information is disclosed for these purposes, reasonable steps must be taken to de-identify the information, however, if the purpose cannot be served by using de-identified information and it is impracticable to seek consent,[14] then identified information may be used.

Any identified information disclosed in these circumstances must not be published in a generally available publication.

### 5.8.4 HPP 2.2(h): Disclosure to prevent risk to a person or the public

HPP 2.2(h) permits the disclosure of information if it is necessary to lessen or prevent:

- A serious and imminent threat to a person's life, health, safety or welfare
- A serious threat to public health, safety or welfare.

A 'serious' threat reflects significant danger and could include:

- A potentially life threatening situation or one that may result in serious injury or illness
- The threat of infecting a person with a disease that may result in disability or death
- An emergency following an accident when a person's health could be in danger without timely decision and action.

A threat is 'imminent' if it is about to occur or, if without quick action, the threat may escalate. This may include a threat posed that could result in harm immediately or in a few days or weeks. It may be less likely to apply where the threat may not eventuate for some months or longer.

A threat to the public must be serious to necessitate disclosure of health information, but it does not have to be imminent. However, a shortage of time within which to take action could contribute to the seriousness of the threat. For example, a consumer may make threats to significantly damage a prominent landmark in another State, and that damage may threaten the health and safety of members of the community. The seriousness of the threat is low while the person remains in Victoria, but if the person has purchased an airflight ticket, this action in addition to the shortage of time to take action, increase the seriousness of the threat.

14. It must be more than merely inconvenient or contrary to previous practice for the task of seeking consent to be 'impractical'. Also, the possibility that the person might refuse to give consent is not an acceptable reason for not asking.

Determining whether a threat to the public is 'serious' is a matter for judgment in the circumstances. It requires consideration of how likely it is that the threat will occur and the seriousness of the consequences if the threat eventuates. Some indicators that a threat could be serious are:

- People may die or be injured or be put at serious risk
- The people who are likely to be affected cannot be identified in advance
- It will be very difficult to contain the repercussions if the threat is realised
- The impact of the threat will disrupt whole communities.

**Determining whether the disclosure is 'necessary'**

HPP 2.2(h) permits the disclosure of information if it is 'necessary' to lessen or prevent a threat. A decision to disclose identifying information to prevent a threat must include consideration of whether disclosing the information is 'necessary' in the circumstances. This can only be assessed at the time, but consider the following:

- Are there good reasons to believe that the threat is real?
- How will disclosing the information prevent or lessen the threat?
- What are the alternatives? Is the information available from another source? Can this be achieved by disclosing less - or different - information? Can you rely on other sources of authority, such as consent or another law?

### 5.8.5 HPP 2.2(k): Disclosure for legal or equitable claims

HPP 2.2(k) permits the disclosure of information where this is necessary for the establishment, exercise or defence of a legal or equitable claim. For example, it may be necessary for a 'relevant psychiatric service' to disclose information to its legal advisors while responding to a complaint of discrimination.

### 5.8.6 HPP 2.2(l): Disclosure in prescribed circumstances

HPP 2.2(l) permits the disclosure of information in prescribed circumstances. There are currently no circumstances that have been prescribed.

### 5.8.7 HPP 2.5: Disclosure when a person is missing or dead

HPP 2.5 permits the disclosure of information if a consumer is suspected to be or is dead, is suspected to be missing or is missing or is involved in an accident or other misadventure and is incapable of consenting to the disclosure.

Disclosure in these circumstances should only be to the extent reasonably necessary to identify the consumer or to ascertain the identity and location of an immediate family member or other relative of the person to:

- Enable a member of the police force, a coroner or other prescribed organisation to contact the immediate family member or other relative for compassionate reasons
- Assist in the identification of the person.

Other than where it is known that a consumer is dead, the disclosure of information should not be contrary to any wish expressed by the consumer before they went missing or became incapable of consenting. However, HPP 2.5 does not override the obligation of service providers to give information to the police, other prescribed individuals and the courts to enable the apprehension of patients who are absent without leave, for example under ss. 43, 53, 53AA, 53AD and Part 5A of the Mental Health Act and ss. 30, 30A, and 30B of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

## 5.9 Disclosure for research

Section 120A(3)(g) permits the disclosure of information for the purposes of medical and social research if the research has been approved by the ethics committee of the 'relevant psychiatric service' and the requirements of Health Privacy Principle (HPP) 2.2(g) of the Health Records Act have been met.

HPP 2.2(g) permits the disclosure of health information if it is necessary for research or analysis of statistics in the public interest and:

- The purpose cannot be served by using de-identified information
- It is impracticable to seek consent[15]
- The 'relevant psychiatric service' reasonably believes the recipient of the information will not further disclose the information, except as permitted under s. 120A(4) (see below)
- The disclosure is in accordance with the research guidelines issued by the Health Services Commissioner, which are available from the Commissioner's website at www.health.vic.gov.au/hsc

Under s. 120A(4) of the Act, a person who receives information by reason of s. 120A(3)(g) must not give the information to another person unless it is also for the purpose of research and this further disclosure is approved by the same ethics committee that approved the original disclosure and is given in accordance with HPP 2.2(g).

Information disclosed for the purposes of research must not be published in a form that identifies an individual.

## 5.10 Disclosure to a court

Section 120A(3)(b) permits the disclosure of information to a court in the course of criminal proceedings. The court will issue a subpoena, which may require the production of a file to the court or for a person to give evidence in court or both. Some courts and tribunals may issue a 'witness summons' or 'summons'. These documents have the same legal effect as a subpoena. The person named in the subpoena must comply with the request in the subpoena; otherwise the court may issue a warrant to apprehend that person. The information must be provided directly to the court and not given to a lawyer, regardless of whether or not the lawyer is acting on behalf of the consumer.

Courts may issue subpoenas about other matters (other than criminal proceedings), for example the Family Court of Australia or the Coroner's Court. In general terms, the person named in the subpoena must comply with the subpoena. However, the legal issues concerning requests for clinical records or consumer information are complex and it is possible to object to the production of a document in certain circumstances. Mental health service providers should seek legal advice about how to respond to a subpoena.[16]

## 5.11 Disclosure for insurance claim

Section 120A(3)(eb) permits the disclosure of information to an organisation providing insurance or indemnity cover or their agents, where the disclosure relates to any claim or liability incurred by the 'relevant psychiatric service'.

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15. It must be more than merely inconvenient or contrary to previous practice for the task of seeking consent to be 'impractical'. Also, the possibility that the person might refuse to give consent is not an acceptable reason for not asking.

16. Further information about responding to subpoenas is provided in the Chief Psychiatrist's guideline *Subpoenas for documents, search warrants, or other requests by police for information* (Department of Human Services, August 2004). The guideline is available at www.health.vic.gov.au/mentalhealth/cpg

## 5.12 Disclosure to a support organisation

Section 120A(ga) permits the disclosure of information to a person or class of persons designated under s. 141(5) of the *Health Services Act 1988* in the course of carrying out support functions designated under that provision. This provision was intended to deal with circumstances where a support function, such as health information management, is provided by one health service to another health service.

There have been no classes of person or support functions designated under s. 141(5) of the Health Services Act. As a result, this sub-section is not operational.

## 5.13 Disclosure to review bodies

Section 120A(h) and (ha) permit the disclosure of information to the Mental Health Review Board, the Victorian Civil and Administrative Tribunal (VCAT) and the Forensic Leave Panel if the information is required in connection with any proceedings before these review bodies. This provision permits staff of a 'relevant psychiatric service' to provide necessary clinical reports and other health information to these bodies.

### 5.13.1 Disclosure to patients and advocates prior to Mental Health Review Board hearings

Section 26(7) of the Act entitles an involuntary patient under the Act and their legal representative or advocate to inspect or otherwise have access to any of the documents that will be presented to the board at least 24 hours prior to the person's hearing. This includes the *Report on involuntary status for the Mental Health Review Board* and the person's clinical record.[17] The board has issued a practice direction specifying additional requirements concerning timelines for preparing the report and making copies available to the patient and other parties to a hearing.[18]

The authorised psychiatrist may apply to the board to restrict access to a document or part of any document (s. 26(8)) if it would:

- cause serious harm to the person's health or the health or safety of another person
  or
- involve the unreasonable disclosure of information relating to the personal affairs of any person
  or
- breach a confidentiality provision imposed by a person who supplied the information contained in the document.

The board will hear the authorised psychiatrist's application to restrict access to the document(s) as a preliminary issue before the full review or appeal hearing, and make a decision as to whether or not the person should see the document(s). This occurs in the absence of the involuntary patient, although their legal representative or advocate may be present.

If the board decides that the person may see the document(s), or parts of the document(s), it will adjourn to allow the person sufficient time to read them. If the board decides the person should not see a document, it may still allow the person's legal representative or advocate to have access. The board may also decide not to allow anyone to read the document(s) and not to view the material itself. However, a determination of the board will commonly be based on information that is available to all parties.

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17. Further information is provided in the Chief Psychiatrist's guideline, *Patient access to files for Mental Health Review Board hearings* (Department of Human Services, November 2001). The guideline is available at www.health.vic.gov.au/mentalhealth/cpg

18. Mental Health Review Board, Practice Direction 2004/1, *Report on involuntary status for the Mental Health Review Board*, Version 2.1, December 2004. The practice direction is available at www.mhrb.vic.gov.au

## 5.14 Disclosure in the public interest

### 5.14.1 Disclosure based on individual circumstances

Section 120A(i) permits the disclosure of information to a person if the Minister for Health considers the disclosure would be in the public interest. This provision has not been used in recent years and to some extent has been overtaken by the amendments to s. 120A by the Health Records Act. In particular, Health Privacy Principle 2.2(h) permits the disclosure of information to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare. These are the types of circumstances that would have been addressed by s. 120A(i) in the past. Nevertheless, s. 120A(i) provides a flexible option when no other exception applies. The requirement that disclosure be in the public interest is a high test. The Minister would need to be satisfied that the public interest in disclosing the information in the circumstances outweighs the individual's right to confidentiality and the competing public interest in minimising any interference in the privacy of health information. It is the Minister's decision as to whether disclosure is in the public interest. 'Relevant psychiatric services' should contact the Chief Psychiatrist on 9096 7571 for advice if they wish to exercise this ground for disclosing information.

### 5.14.2 Disclosure based on categories of information

Section 120A(3)(l) and (3A) permits the disclosure of types of information specified by the Minister for Health by classes of persons specified by the Minister, if the Minister considers it necessary in the public interest.

An exemption under s. 120A(3)(l) and (3A) was granted by the former Minister for Health to allow the disclosure of information to Victoria Police about people who are unfit to have a firearm.[19] Registered medical practitioners, registered nurses, registered psychologists, social workers and occupational therapists employed by the following categories of 'relevant psychiatric services' are covered by the exemption:[20]

- An approved mental health service
- A state child and adolescent psychiatry service
- A hospital admitting and caring for people with a mental disorder
- A psychiatric out-patient clinic
- A community mental health service.

However, after the exemption was granted, the *Firearms Act 1996* (FA) was amended to provide statutory immunity for certain health professionals who advise the police in good faith that a person to whom the health professional has been providing services is not a fit and proper person to possess, carry or use a firearm.[21]

The statutory immunity applies to: a registered medical practitioner, a registered psychologist, a registered nurse, a prescribed class of social worker and a prescribed class of professional counsellor. The class of social workers are persons who are members of, or eligible for membership of the Australian Association of Social Workers (AASW).[22] The class of professional counsellors remains undefined. The statutory immunity is not limited to any particular type of service but applies to any person to whom the health professional has been providing professional services.

Only those professions not covered by the FA will need to rely upon the Ministerial exemption for immunity.

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19. More details about the exemption are contained in the program management circular *Ministerial exemption relating to the release of information: persons unfit to possess, carry or use a firearm* (Department of Human Services, June 2000). The circular is available at www.health.vic.gov.au/mentalhealth/pmc

20. This list excludes the following categories of 'relevant psychiatric service': agencies providing community support services (including PDRSS); premises licensed to perform electroconvulsive therapy; any mental health service of a community health centre.

21. Section 183, FA

22. Regulation 26, *Firearms Regulations* 2008

## 5.15 Disclosure to the Department of Human Services

### 5.15.1 Disclosure to the Secretary

Section 120A(3)(j) permits the disclosure of information to the Secretary to the Department of Human Services. This includes disclosure to officers of the department who exercise functions and duties of the Secretary either subject to a delegation (or other authority) or as part of their duties as an employee of the department. For example, a 'relevant psychiatric service' may disclose information to the Secretary for incident reporting purposes.

### 5.15.2 Disclosure to the Minister

Section 120A(3)(k) permits the disclosure of information to the Minister for Mental Health. For example, a 'relevant psychiatric service' may disclose information to the Minister if the Minister is investigating a complaint on behalf of a member of the public.

## 5.16 Disclosure to the Australian Red Cross

Section 120A(3)(d) permits information to be given to the Australian Red Cross for the purpose of tracing blood, or blood products derived from blood, infected with any disease or the donor or recipient of any such blood.

## 5.17 Disclosure under the Children, Youth and Families Act 2005

As discussed earlier, information may be disclosed where it is expressly authorised or permitted under the Mental Health Act or any other law. The *Children, Youth and Families Act 2005* (CYFA) is such a law.

The CYFA establishes the system of services that provide support to vulnerable children and their families, including Child Protection and Child FIRST (Family Information Referral and Support Teams). Child Protection has statutory powers and can use these to protect a child. Child FIRST are teams run by registered community services that can receive confidential referrals about a child of concern. Child FIRST does not have statutory powers to protect a child but can help to connect children and their families to family services or other services, including disability, family violence, mental health and drug and alcohol treatment services. Further information about these services, their contact details and the circumstances when a referral should be made can be obtained at www.office-for-children.vic.gov.au/child-protection-family-services

One feature of the CYFA is that it allows mental health services and clinicians to share information with Child Protection and Child FIRST in prescribed circumstances to promote the safety and development of vulnerable children.[23]

### 5.17.1 Disclosure where there is significant concern for a child's wellbeing

Any person can make a referral to Child FIRST or a report to Child Protection if they have a significant concern for a child's wellbeing.[24] A referral or report can also be made prior to a child's birth if the concern relates to the wellbeing of the child after their birth.[25]

23. Under the CYFA, a child is a person under 17 years of age, or if subject to a Children's Court order, under 18.

24. Sections 28 and 31, CYFA

25. Sections 29 and 32, CYFA

Making a referral or report in good faith is authorised by the CYFA and is not a contravention of s. 120A of the Mental Health Act.[26] The person making such a referral or report is legally and professionally protected.[27] The identity of the person making the referral or report is also protected, unless they consent to it being disclosed.[28] However, if Child FIRST believes that a child is in need of protection, they must report the case to Child Protection. This is because Child FIRST does not have any statutory powers to protect a child. When Child FIRST receives a referral and reports it to Child Protection, they will disclose the identity of the referrer to Child Protection, but Child Protection cannot then disclose the referrer's identity to anyone else without the referrer's written consent.

When Child FIRST or Child Protection receives a referral or report about a child, they may decide to collect more information about the child to decide the best response to the referral or report. 'Relevant psychiatric services' may be contacted for information and also to discuss a possible referral to provide services. If Child FIRST or Child Protection contacts a service for these purposes, relevant information may be disclosed without the consent of the child or their parents.[29] Disclosing information in good faith is not a breach of s. 120A of the Mental Health Act.[30]

It is important to note that while the CYFA permits the disclosure of information in the above circumstances, it does not require it. However, sharing information with agencies such as Child FIRST and Child Protection helps to promote a child's safety, development and access to services, and is encouraged wherever possible.

### 5.17.2 Disclosure when a child is in need of protection

Any person may make a report to Child Protection if they believe that a child is in need of protection.[31]

Registered medical practitioners and registered nurses **must** make a report to Child Protection and other health professionals **should always** make a report to Child Protection, if they believe on reasonable grounds that a child is in need of protection from physical injury or sexual abuse.[32] If a child is in need of protection from other forms of harm, such as emotional abuse, neglect or abandonment, mental health services and clinicians should always make a report to Child Protection, even though the law does not require this.

Making a report to Child Protection in good faith is authorised by the CYFA and is not a breach of s. 120A of the Mental Health Act and the person making the report is legally and professionally protected.[33] The identity of a person making a report is protected, unless they consent to their identity being revealed.[34]

If Child Protection determines that a report is a 'protective intervention report', it will conduct an investigation. If Child Protection decides that a report does not meet the standard to be a 'protective intervention report', but there is significant concern for the wellbeing of the child, the matter will be managed as described in 5.17.1 above.[35]

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26. Section 40, CYFA
27. Section 40, CYFA
28. Section 41, CYFA
29. Sections 35 and 36, CYFA
30. Section 37, CYFA
31. Section 183, CYFA
32. Registered medical practitioners and registered nurses are 'mandatory reporters' under s. 182 of the CYFA. Under s. 183, CYFA, any person may make a report based on reasonable grounds.
33. Section 189, CYFA
34. Section 191, CYFA
35. A decision is made under s. 187 of the CYFA. Child protection will have regard to the grounds in s. 162 in deciding whether a child is in need of protection and whether a report is a 'protective intervention report'.

### Disclosure during an investigation by Child Protection

During an investigation, mental health services and clinicians are authorised to disclose relevant information to Child Protection[36] and the identity of the person disclosing the information is protected.[37]

### Disclosure following an investigation by Child Protection

Following a protective investigation, Child Protection has a number of options for action depending on the outcome of its investigation. One option is to undertake a period of further intervention and assessment and to develop a case plan. An information holder[38] may disclose information that is relevant to the protection or development of the child to Child Protection to support this ongoing case planning following an investigation.[39]

## 5.17.3 Disclosure when a child is subject to a protection order

If the Children's Court makes a 'protection order' for a child, Child Protection is responsible for ensuring the child's safety, stability and development. Child Protection may seek information about the child that is relevant to assessing the child's circumstances. An information holder is permitted to disclose relevant information in these circumstances.[40]

### Compulsory disclosure of information

An authorised officer may, in writing, direct an information holder to give information on any matter concerning the protection or development of the child who is subject to a protection order, to produce relevant documents and give reasonable assistance.[41]

It is an offence under the CYFA to refuse or fail to comply with a direction without reasonable excuse.[42]

## 5.17.4 Disclosure of information about an adult consumer

When Child FIRST or Child Protection receives a referral or report about a child, they may seek and be given information about a parent or family member of the child where this is relevant to the protection or development of the child.[43] This means a mental health service may disclose information about a client (being the parent or family member), even where the child is not a client of the service, provided the requested information is relevant to the protection or development of the child.

36. Section 208,CYFA
37. Section 209, CYFA
38. The term 'information holder' is defined in s. 3 of the CYFA and includes 'the person in charge of a relevant psychiatric service', registered medical practitioners, registered nurses and registered psychologists. In relation to 'the person in charge of a relevant psychiatric service', it is the person who is in charge at the time and on the day the information is requested and disclosed. Mental health service providers must develop policies and procedures for the person in charge to delegate their information sharing authorisations to appropriate managers or senior clinicians within the organisation.
39. Sections 192 and 193, CYFA
40. Sections 192 and 193, CYFA
41. Section 196, CYFA
42. Section 197, CYFA
43. Sections 35, 36, 192, CYFA

### 5.17.5 Disclosure under the CYFA and good clinical practice

If a mental health service is contacted to provide information about a child or the child's family members, it is important to confirm the identity of the person making the request. It may be appropriate to take a phone number and call back. Individual clinicians are encouraged to discuss the information they plan to disclose with a more senior colleague or service manager and to follow service policies and procedures.

Any decision to disclose information under the CYFA should be guided by the factors discussed at 5.2. Wherever possible, it is preferable to seek consent from the child or the family member before disclosing information, provided this does not place the child or another person at risk.

## 5.18 Disclosure under the Child Wellbeing and Safety Act 2005

Under the *Child Wellbeing and Safety Act 2005*, the Child Safety Commissioner is required to conduct an inquiry into the death of a child who is a client of Child Protection at the time of their death or within three months of their death. The person in charge of a relevant psychiatric service must provide the Child Safety Commissioner or an authorised person with access to any information held by the service concerning a child whose death is the subject of an inquiry and which the Commissioner or authorised person reasonably requires.[44] A disclosure made in good faith is not a breach of section 120A.[45]

# 6. Documenting decisions

All decisions to disclose information should be documented in the consumer's clinical record. Records should show who made the decision, to who was the information disclosed, when and why, and what information was disclosed.

# 7. Health Services Commissioner's guidelines

The Health Services Commissioner is empowered by s. 22 of the Health Records Act to issue guidelines for the purposes of the Health Privacy Principles (HPP). The guidelines are binding and have the same authority as the Health Records Act itself.

The Commissioner has issued guidelines concerning HPP 2.2(g): *Statutory guidelines on research* (Health Services Commissioner, February 2002) and may issue other guidelines in the future. Mental health service providers should keep up to date with the Commissioner's guidelines.

# 8. Charter of human rights

## 8.1 Introduction

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter) seeks to promote and protect certain human rights. The Charter defines the protected rights, specifies when and how these rights can be limited and requires public authorities, which include public sector mental health services, to act compatibly with the rights and to give proper consideration to the rights when making decisions. The obligations on public authorities came into operation on 1 January 2008.

44. Section 34(3), Child Wellbeing and Safety Act

45. Section 36, Child Wellbeing and Safety Act

The Charter recognises that human rights are not absolute but may be limited in certain circumstances. This allows a balance to be struck between individual rights and the public interest. Section 7 of the Charter provides that a right can be subject to such reasonable limits as can be demonstrably justified in a free and democratic society, based on human dignity, equality and freedom and taking into account relevant factors, including:

- the nature of the right – what does the right protect and what are its underlying values
- the importance of the purpose of the limitation – is the purpose for wanting to limit the right very pressing and important in the public interest
- the nature and extent of the limitation – how does it infringe human rights, in what way and to what extent does the limitation interfere with the right
- the relationship between the limitation and its purpose – is there a logical connection between the limitation and its purpose and is it proportionate to its purpose
- any less restrictive means reasonably available to achieve the purpose.

### 8.2 Privacy

The Charter establishes a right to privacy and requires that a person must not have their privacy unlawfully or arbitrarily interfered with. This means any decision to use or disclose information must have a legal basis and should not be arbitrary. This will require an individual judgement, having regard to the relevant law, the reasons for the disclosure and the factors described above and also at chapter 5.2. A decision to disclose information that has been made in this context and in good faith will be consistent with the Charter.

Further information about the Charter is available from the Victorian Equal Opportunity and Human Rights Commission website at www.humanrightscommission.vic.gov.au

## 9. Administrative definitions

**Collection.** Information is collected by an organisation whenever it gathers, acquires or obtains the information from any source and by any means including where it keeps information it has not asked for.

**Consent.** The voluntary agreement of a person or a person's authorised representative about a proposed action. It can be either express or implied. Express consent is provided explicitly, either orally or in writing. It is unequivocal and does not require any inference on the part of the organisation seeking consent. Implied consent arises where consent may be reasonably inferred from the action or inaction of a person. Consent must be meaningful, that is, a person must understand what has been consented to and the implications of this. Consent must be obtained without coercion.

**De-identify.** In order for information to be considered de-identified, all identifiable references to a person must be removed and the context and content of the remaining details must not allow the identity of a person to be reasonably ascertained.

**Disclosure.** Disclosure refers to an organisation communicating information to another organisation or person outside the organisation.

**Use.** Use refers to the handling of information within an organisation.

## 10. Further enquiries about confidentiality and information privacy

Mental health services providers must refer to the Act and the Health Records Act for a complete understanding of the legislation and the Health Privacy Principles. If staff have queries about their duty to maintain the confidentiality of a consumer, service providers should obtain independent legal advice about their obligations under s. 120A of the Act and the Health Records Act.

For further information about the Health Records Act, visit the department's website at www.dhs.vic.gov.au/privacy or www.health.vic.gov.au/healthrecords or the website of the Health Services Commissioner at www.health.vic.gov.au/hsc

A quick reference guide summarising the legal grounds for disclosing information is included in appendix 1.

# Appendix 1: Quick reference guide

Information in this table is intended as a quick reference guide only. It is not a substitute for reading the relevant legislation. If a 'relevant psychiatric service' or a 'relevant person' has queries about confidentiality or their obligations under the law, they should seek independent legal advice.

| **Summary of legal grounds for disclosing mental health consumer information** | | | |
|---|---|---|---|
| **Requester** | **Information disclosure** | **Legislation** | **Guideline reference** |
| Advocates | • The advocate for a consumer (who is an involuntary patient under the Act and due to have a hearing before the Mental Health Review Board) is entitled to inspect or otherwise have access to any of the documents that will be presented to the board at least 24 hours prior to the hearing. | • s. 26(7) | • 5.13.1 |
| | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| Aged care service provider (including high and low level residential services) | • Information may be disclosed with consumer's consent or the consent of a guardian (if any) or another legally authorised representative, if the information is reasonably required to provide support and care to the consumer. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if the information is required in connection with the further treatment of the consumer. | • s. 120A(3)(e)(i) | • 5.6 |
| Alcohol & other drug treatment service | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if the disclosure is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare. | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |
| Ambulance service | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if it is reasonably required to carry out or exercise powers under the Mental Health Act or any other Act. For example, transport of consumer who has been recommended under section 9; transport of a consumer subject to an authority to transport under section 9A; transport of a consumer subject to an involuntary treatment order who must be taken to an approved mental health service under ss. 12(6), 12AA(7) to 12AC(4)(b) of the Act, apprehension and transport of a patient absent without leave under ss. 43, 53, 53AA, 53AD, and Part 5A of the Act and ss. 30, 30A and 30B of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. | • s. 120A(2) | • 5.1 |
| | • Information may be disclosed if the disclosure is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare. | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |
| Australian Red Cross | • Information may be given to the Australian Red Cross for the purpose of tracing blood, or blood products derived from blood, infected with any disease or the donor or recipient of any such blood. | • s. 120A(3)(d) | • 5.16 |

| Summary of legal grounds for disclosing mental health consumer information | | | |
|---|---|---|---|
| **Requester** | **Information disclosure** | **Legislation** | **Guideline reference** |
| Carers/primary carers | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if the information is reasonably required for the ongoing care of the consumer and the carer receiving the information will be involved in providing that care. | • s. 120A(3)(ca) | • 5.4 |
| | • Information may be disclosed if the disclosure is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare. | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |
| | • If a consumer who is an involuntary patient is to have electroconvulsive therapy with the consent of the authorised psychiatrist, all reasonable efforts must be made to notify the consumer's primary carer. | • s. 73(3)(b) | • 5.1 |
| Chief Psychiatrist | • Information may be disclosed if it is reasonably required to carry out functions under, or expressly authorised or permitted by, the Act or any other Act. For example under section 106 of the Act, the Chief Psychiatrist and authorised officers may require information relating to consumers and by written notice require the production of, inspect, make copies of or take extracts from consumer documents or any record required to be kept under the Act. Under section 106A, the Chief Psychiatrist is to receive a report of the death of a consumer that is a 'reportable death' within the meaning of s.3 of the *Coroners Act 1985*. | • s. 120A(2) (a)&(c) | • 5.1 |
| Child protection – child in need of protection | • Registered medical practitioners and registered nurses who, in the course of practising their profession or carrying out the duties of their employment, form the belief on reasonable grounds that a child is in need of protection from physical injury or sexual abuse **must** make a report to Child Protection of that belief and of the reasonable grounds for it as soon as practicable. | • s. 184 CYFA | • 5.17.2 |
| | • Mental health services and clinicians who believe on reasonable grounds that a child is in need of protection may make a report to Child Protection of that belief and of the reasonable grounds for it. | • s. 183 CYFA | • 5.17.2 |
| | • Mental health services and clinicians may disclose relevant information to Child Protection during an investigation. | • s. 208 CYFA | • 5.17.2 |
| | • An information holder* may disclose relevant information to Child Protection after an investigation is complete to support ongoing case planning. | • ss. 192 & 193 CYFA | • 5.17.2 |
| | • An information holder* may disclose relevant information to Child Protection about a child subject to a protection order made by the Children's Court. | • ss. 192 & 193 CYFA | • 5.17.3 |
| | • An information holder* **must** disclose information to Child Protection about a child subject to a protection order if directed in writing by an authorised officer. | • s. 196 CYFA | • 5.17.3 |
| | * **'Information holder'** is defined in the CYFA and includes 'the person in charge of a relevant psychiatric service', registered medical practitioners, registered nurses and registered psychologists. | • s. 3 CYFA | • 5.17.2 |

| Summary of legal grounds for disclosing mental health consumer information | | | |
|---|---|---|---|
| **Requester** | **Information disclosure** | **Legislation** | **Guideline reference** |
| Child protection and Child FIRST – significant concern for a child's wellbeing | • Any person may make a referral to Child FIRST or a report to Child Protection if they have a significant concern for a child's wellbeing. | • ss. 28 & 31 CYFA | • 5.17.1 |
| | • A referral or report may be made prior to a child's birth if the concern relates to the wellbeing of the child after their birth. | • ss. 29 & 32 CYFA | • 5.17.1 |
| | • When Child FIRST or Child Protection receives a referral or report, they may decide to collect more information about the child to decide the best response to the referral or report or consult with service providers about a possible referral to provide services. Mental health services may disclose relevant information to Child FIRST or Child Protection in these circumstances. | • ss. 35 & 36 CYFA | • 5.17.1 |
| Child Safety Commissioner | • The Child Safety Commissioner must conduct an inquiry and prepare a report in relation to a child who has died and who was a client of Child Protection at the time of their death or within 3 months of their death. | • s. 33 *Child Wellbeing and Safety Act 2005* | • 5.18 |
| | • The person in charge of a relevant psychiatric service must provide the Child Safety Commissioner or an authorised person with access to any information, documents or files held by the service relating to a child whose death is the subject of an inquiry that the Commissioner or authorised person reasonably requires. | • s. 34 *Child Wellbeing and Safety Act 2005* | • 5.18 |
| | • A health professional (registered medical practitioner, registered nurse, registered psychologist) or a welfare practitioner may disclose to the Child Safety Commissioner or an authorised person any information in the possession of that person that relates to the death of a child that is the subject of an inquiry. | • s. 35 *Child Wellbeing and Safety Act 2005* | • 5.18 |
| | • A disclosure of information under section 34 or 35 of the Child Wellbeing and Safety Act does not constitute a contravention of section 120A. | • s. 36 *Child Wellbeing and Safety Act 2005* | • 5.18 |
| Clinical staff (other organisations) | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if the information is required in connection with the further treatment of the consumer. | • s. 120A(3)(e)(i) | • 5.6 |
| | • Information may be disclosed where the information is shared between public sector mental health services through the operational data store (ODS) to enable treatment of the consumer. | • s. 120A(3)(e)(ii) | • 5.7 |
| | • Information may be disclosed if the disclosure is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare. | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |

| Summary of legal grounds for disclosing mental health consumer information | | | |
|---|---|---|---|
| **Requester** | **Information disclosure** | **Legislation** | **Guideline reference** |
| Clinical staff (internal) | • The Health Privacy Principles (HPP) of the *Health Records Act 2001* regulate the use of information within a 'relevant psychiatric service'. | • s. 120A(2B)<br>• HPP 2, *Health Records Act 2001* | • 4.0 |
| | • Information may be used if the use is for the primary purpose for which the information was collected. | • HPP 2.1, *Health Records Act 2001* | • 4.0 |
| | • Information may be used if the use is to provide further health services to the consumer. | • HPP 2.2(e) , *Health Records Act 2001* | • 4.0 |
| | • Information may be used if the use is for funding, management, planning, monitoring, improvement, evaluation or training purposes and the purpose cannot be served by using de-identified information and it is impracticable for the 'relevant psychiatric service' to seek the consumer's consent or reasonable steps have been taken to de-identify the information and any identified information will not be published in a generally available publication. | • HPP 2.2(f) , *Health Records Act 2001* | • 4.0 |
| | • Information may be used if the use is for the purposes of research and it is impracticable to seek the consumer's consent and the purpose cannot be served by de-identified information and the use is in accordance with the Health Services Commissioner's guidelines. | • HPP 2.2(g) , *Health Records Act 2001*<br>• Health Services Commissioner's guidelines | • 4.0 |
| | • Information may be used f the use is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare | • HPP 2.2(h), *Health Records Act 2001* | • 4.0 |
| Community visitors | • Community visitors may inspect a clinical record or any other document relating to a consumer if the consumer has given consent in writing. | • s. 112(1)(d) | • 5.1 |
| Consumer | • A consumer can apply to access their information under the *Freedom of Information Act 1982*. | • s. 13 *Freedom of Information Act 1982* | • 5.1 |
| | • A consumer (who is an involuntary patient under the Act and due to have a hearing before the Mental Health Review Board) and their legal representative or advocate is entitled to inspect or otherwise have access to any of the documents that will be presented to the board at least 24 hours prior to the hearing. | • s. 26(7) | • 5.13.1 |
| | • The authorised psychiatrist may apply to the board to restrict access to a document or part of any document if it would cause serious harm to the patient's health or the health or safety of another person or involve the unreasonable disclosure of information relating to the personal affairs of any person or breach a confidentiality provision imposed by a person who supplied the information contained in the document. | • s. 26(8) | • 5.13.1 |

| Summary of legal grounds for disclosing mental health consumer information | | | |
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| **Requester** | **Information disclosure** | **Legislation** | **Guideline reference** |
| Coroner | • The death of a consumer that is a 'reportable death' within the meaning of the *Coroners Act 1985* must be reported to a coroner. | • s. 13 *Coroners Act 1985* | • 5.1 |
| | • A coroner, or a member of the police force authorised by the coroner, may if it is necessary for an investigation, enter and inspect premises, take a copy of any document and take possession of anything that is relevant to the investigation. | • s. 26 *Coroners Act 1985* | • 5.1 |
| Courts | • Information may be disclosed to a court in the course of criminal proceedings. The court will issue a subpoena. | • s. 120A(3)(b) | • 5.10 |
| | • Information may be disclosed to a court about other matters (other than criminal proceedings). The court will issue a subpoena. | | • 5.10 |
| Department of Human Services | • Information may be disclosed to the Secretary to the Department of Human Services. This includes disclosure to officers of the department who exercise functions and duties of the Secretary either subject to a delegation (or other authority) or as part of their duties as an employee of the department. | • s. 120A(3)(j) | • 5.15 |
| Family members | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if the information is reasonably required for the ongoing care of the consumer and the family member receiving the information will be involved in providing that care. | • s. 120A(3)(ca) | • 5.4 |
| | • Family members who do not provide support or care to the consumer might be given information if it is communicated in general terms. | • s. 120A(3)(c) | • 5.5 |
| | • Information may be disclosed if the disclosure of information is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare. | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |
| Firearms | • The *Firearms Act 1996* provides statutory immunity to certain health professionals to allow disclosure to Victoria Police about people who are unfit to have a firearm. | • s. 183 *Firearms Act 1996* | • 5.14.2 |
| | • Health professionals not covered by the *Firearms Act 1996* immunity may be able to rely upon the exemption to confidentiality granted by the Minister for Health if they satisfy the professional and employment requirements of the exemption. | • s. 120A(3)(l) and (3A) | • 5.14.2 |
| | • Information may be disclosed if the disclosure of information is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |
| Forensic Leave Panel (FLP) | • Information may be disclosed to the panel if it is required in connection with a hearing conducted by the panel. | • s. 120A(3)(ha) | • 5.13 |
| Friends of consumer | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • Friends of the consumer might be given information if it is communicated in general terms. | • s. 120A(3)(c) | • 5.5 |

| Summary of legal grounds for disclosing mental health consumer information | | | |
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| **Requester** | **Information disclosure** | **Legislation** | **Guideline reference** |
| Guardians | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • A guardian can apply to access information about the consumer they represent under the *Freedom of Information Act 1982*. | • s. 13 Freedom of *Information Act 1982* | • 5.1 |
| | • Information may be disclosed if the information is reasonably required for the ongoing care of the consumer and the guardian receiving the information will be involved in providing that care. | • s. 120A(3)(ca) | • 5.4 |
| | • Information may be disclosed if the disclosure of information is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |
| | • A guardian of a consumer who has been made an involuntary patient must be notified of this fact and the reasons for it. | • s. 12AE | • 5.1 |
| | • If a consumer is an involuntary patient and is going to have involuntary electroconvulsive therapy with the consent of the authorised psychiatrist, all reasonable efforts must be made to notify the consumer's guardian (if any). | • s. 73(3)(b) | • 5.1 |
| Health Services Commissioner | • The Health Services Commissioner is an independent statutory authority established to receive and resolve complaints about health service providers. | • s.5 & 9, *Health Services (Conciliation and Review) Act 1987* | |
| | • When a complaint is made, the Commissioner obtains the consent of the consumer to forward a copy of the complaint to the service provider and to access the consumer's health information and medical records if necessary. The Commissioner's complaint form includes an authority that expressly authorises the Commissioner to access information. | • s. 120A(3)(a) | • 5.3 |
| Lawyers | • The legal representative or advocate for a consumer (who is an involuntary patient under the Act and due to have a hearing before the Mental Health Review Board) is entitled to inspect or otherwise have access to any of the documents that will be presented to the board at least 24 hours prior to the hearing. | • s. 26(7) | • 5.13.1 |
| | • Information for court proceedings must be requested with a subpoena issued by the relevant court. The information must be provided directly to the court and not given to a lawyer, regardless of whether or not the lawyer is acting on behalf of the consumer. | | • 5.10 |
| Mental Health Review Board | • Information may be provided to the Mental Health Review Board if it is required in connection with a hearing conducted by the board. | • s. 120A(3)(h) | • 5.13 |

| Summary of legal grounds for disclosing mental health consumer information | | | |
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| **Requester** | **Information disclosure** | **Legislation** | **Guideline reference** |
| Psychiatric Disability Rehabilitation & Support Services (PDRSS) | • Information may be disclosed with the consent of the consumer. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if the information is required in connection with the further treatment of the consumer. | • s. 120A(3)(e)(i) | • 5.6 |
| | • Information may be disclosed if the disclosure is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |
| Police | • Information may be disclosed if the information is reasonably required to carry out or exercise powers under the Act or any other Act. For example, transport of consumer who has been recommended under section 9; transport of a consumer subject to an authority to transport under section 9A; transport of a consumer subject to an involuntary treatment order who must be taken to an approved mental health service under ss. 12(6), 12AA(7) to 12AC(4)(b) of the Act, apprehension and transport of a patient absent without leave under ss. 43, 53, 53AA, 53AD, and Part 5A of the Act and ss. 30, 30A and 30B of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. | • s. 120A(2) | • 5.1 |
| | • Information may be disclosed if the disclosure is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare. | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |
| | • Information may be disclosed if the disclosure relates to a consumer who is suspected to be or is dead, is suspected to be missing or is missing or is involved in an accident or other misadventure and is incapable of consenting to the disclosure. Disclosure should only be to the extent reasonably necessary to identify the consumer or to ascertain the identity and location of an immediate family member or other relative of the person to enable a member of the police force to contact the immediate family member or other relative for compassionate reasons or to assist in the identification of the person. | • s. 120A(3)(ea)<br>• HPP 2.5, *Health Records Act 2001* | • 5.8.7 |
| Private practitioners (GPs, private psychiatrists) | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if the information is required in connection with the further treatment of the consumer. | • s. 120A(3)(e)(i) | • 5.6 |
| | • Information may be disclosed if the disclosure is necessary to lessen or prevent a serious and imminent threat to a person's life, health, safety or welfare or a serious threat to public health, safety or welfare. | • s. 120A(3)(ea)<br>• HPP 2.2(h), *Health Records Act 2001* | • 5.8.4 |

| Summary of legal grounds for disclosing mental health consumer information | | | |
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| **Requester** | **Information disclosure** | **Legislation** | **Guideline reference** |
| Researchers (external) | • Information may be disclosed with the consumer's consent. | • s. 120A(3)(a) | • 5.3 |
| | • Information may be disclosed if the disclosure is for the purposes of medical or social research and the ethics committee of the 'relevant psychiatric service' has approved the research and the requirements of Health Privacy Principle 2.2(g) of the Health Records Act have been met. | • s. 120A(3)(g)<br>• HPP 2.2(g), *Health Records Act 2001* | • 5.9 |
| Researchers (internal) | • The Health Privacy Principles (HPP) of the Health Records Act regulate the use of information within a 'relevant psychiatric service'. | • s. 120A(2B)<br>• HPP 2, *Health Records Act 2001* | • 4.0 |
| | • Information may be used with the consumer's consent. | • HPP 2.2(b), *Health Records Act 2001* | • 4.0 |
| | • Information may be used without the consumer's consent if the use is for research or the compilation or analysis of statistics in the public interest and it is impracticable to seek the consumer's consent and the purpose cannot be served by using de-identified information and the use is in accordance with the Health Services Commissioner's guidelines. | • HPP 2.2(g), *Health Records Act 2001*<br>• Health Services Commissioner's guidelines. | • 4.0 |
| Victorian Civil & Administrative Tribunal (VCAT) | • Information may be provided to VCAT if is it is required in connection with any proceedings before the tribunal. | • s. 120A(3)(h) | • 5.13 |

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## About program management circulars

The information provided in this circular is intended as general information and not as legal advice.

Mental health service management should ensure that procedures are developed and implemented to enable staff to respond to requests for information about consumers in an appropriate manner. If staff have queries about their duty to maintain the confidentiality of a consumer, service providers should obtain independent legal advice about their obligations under s. 120A of the Act and the Health Records Act.

State Government Victoria
Department of Human Services