NSW HEALTH DEPARTMENT

CIRCULAR

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SUBPOENAS

This circular supersedes Circular 93/35 and updates in the Patient Matters Manual and Circular 81/23 concerning the subpoenaing of sensitive records.

The Department, health services and other public health facilities are often required to produce documents on subpoena. The previous circular has been revised to:

- assist health facilities comply with subpoenas and recover where possible the costs associated with compliance; and
- provide information about the Evidence (Confidential Communications) Act 1997 which commenced on 1 January 1998. This Act creates two new "privileges" giving judges and magistrates the ability to exclude evidence of a confidential communication occurring in a professional health relationship and to make it more difficult for evidence of counselling communications to be placed before the Court in cases relating to sexual assault. **In particular, this Act imposes special obligations on health facilities where files that have been subpoenaed contain documents recording communications between a counsellor and a person who has been sexually assaulted.**

This circular is divided into three parts:

Part A - What is a subpoena?

Part B - Subpoenas to produce documents
- Preliminary issues to consider when you receive a subpoena
- On what grounds can a subpoena be challenged? (Note: there are special requirements in relation to sexual assault counselling records)
- Procedures for responding to a subpoena

Part C - Subpoenas to give evidence

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PART A - WHAT IS A SUBPOENA?

A subpoena is an order from a court which directs someone that they must on a given date:

(i) produce to a court certain documents for use in legal proceedings; or

(ii) attend a court on a particular date to be a witness in a hearing and give evidence.

A subpoena can only be issued where there are actual legal proceedings on foot.

In some courts subpoenas are called a “summons to produce documents”. The general principles that apply are the same.

A subpoena must not be ignored. It must be dealt with promptly. Failure to comply with a subpoena is a serious matter. It can result in arrest and even being charged with contempt of court.

All health facilities should have designated officers to co-ordinate responses to subpoenas. All subpoenas should be brought to the attention of the chief executive officer or executive officer of the health facility.

PART B - SUBPOENAS TO PRODUCE DOCUMENTS

1. PRELIMINARY ISSUES TO CONSIDER WHEN YOU READ A SUBPOENA

1.1 Who is the subpoena addressed to?

For a subpoena to be valid it must sufficiently identify the party in possession of the documents that have been subpoenaed. If a subpoena is defective in this regard, the health facility should promptly inform in writing the solicitor who requested the issue of the subpoena and return any conduct money provided. The letter should explain how the subpoena is defective and be copied to the Clerk or Registrar of the Court.

1.2 What are the proceedings about?

From reading the subpoena you will be able to ascertain whether it is a civil or criminal matter and the identities of the parties. If it is a criminal matter you should find out if the subpoena has been issued in sexual assault proceedings. This is important because the issue of the sexual assault communications privilege will usually arise in sexual assault proceedings.

Queries about the proceedings should be directed to the solicitor that requested the issue of the subpoena.

1.3 Has the subpoena been served in time?

The subpoena should be served in sufficient time to allow the collection of documents and delivery to Court. The subpoena will say on it that you need not comply with it if it is served after the due date. The due date will be not less than five days prior to the return date (ie. the date that the documents are required by the Court) unless the Court that issued the subpoena has shortened the time for serving it. If the court has made such an order the subpoena will be marked accordingly.

If the subpoena is served after the due date and there is no note or endorsement on the subpoena from the Court stating that the time for service has been shortened, then the subpoena need not be complied with. If the subpoena is not to be complied with, the Clerk or Registrar of the Court should be contacted and advised in writing that the subpoena will not be complied with and reasons given. The solicitor who requested the issue of the subpoena should also be informed.

1.4 Does it make any difference if the subpoena is a facsimile or a photocopy?

As a general rule the original subpoena should be served to ensure its authenticity. If a photocopy is served or service is by facsimile, the documents can be prepared for despatch but they should not be sent until the original subpoena has been sighted. The solicitor who issued the subpoena should be contacted and informed of this.

The only circumstance where a faxed subpoena must be complied with is where the Court that issued the subpoena has made orders to the effect that the subpoena may be served by facsimile. Such orders are very rarely made.

1.5 What is the date the subpoena must be complied with?

As failure to comply with a subpoena is a serious matter, the return date of each subpoena served on the health facility should be carefully noted as soon as it is received.

2. CONDUCT MONEY

2.1 The rules about whether conduct money is payable and if so, how much, vary between the different types of courts.

Supreme Court, District Court and Local Court
The Supreme Court and District Court Rules state that a subpoena does not have to be complied with unless the party who requested the issue of the subpoena also tenders reasonable expenses. They should be provided when the subpoena is served or up to a reasonable time before the subpoena is to be complied with. Local Courts generally follow the practice of the Supreme and District Courts.

Reasonable expenses include the cost of searching for the documents, collating them and getting them to Court.

Other Courts and Tribunals
However, health workers should be aware that different rules may apply in the case of subpoenas issued by other courts or tribunals such as the Equal Opportunity Tribunal, the Family Court and the Workers Compensation Court. In such cases, it is suggested that the body which issued the subpoena be contacted to confirm its rules with respect to conduct money.

2.2 What if the conduct money is inadequate?

Whether conduct money is adequate will depend on the rules of the Court or Tribunal that issued the subpoena. Having regard to those rules, if the conduct money provided is inadequate:

(i) Call the solicitor who has requested the court to issue the subpoena to inform him or her of your requirements.
(ii) If still no conduct money is supplied or you consider it insufficient, contact the solicitor and attempt to negotiate some compromise on the amount.
(iii) If a compromise cannot be reached, the subpoena need not be complied with. If the subpoena is not to be complied with because of inadequate conduct money a letter should be sent to the Court (and copied to the solicitor) stating this and reasons given.

<u>It should be noted that failure to comply with a subpoena because of inadequate conduct money will probably only delay the time by which you have to comply.</u>

2.3 What if too much conduct money has been provided?

If a record is found and it will cost less than the amount already provided to find, copy and deliver the record to the Court, the records should be delivered to the Court and the balance refunded to the solicitor who requested the issue of the subpoena.

2.4 Are there any special procedures with respect to conduct money if the subpoena involves a lot of work?

If the record is lengthy, or will require a number of files to be searched or otherwise take up staff time so that it will cost more than the amount provided to produce the record, then the solicitor who requested the issue of the subpoena should be contacted and advised of the estimated cost of compliance including staff time in searching and locating the relevant records, photocopy costs and mail or courier fees. Such contact may be by telephone but should be confirmed in writing.

On receipt of the solicitor's cheque for the estimated expenses, the records should be produced.

In the event that the actual costs exceed the estimate, a further account should be raised against the solicitors in question.

If compliance with a subpoena involves a significant amount of work, consideration should be given to whether anything could be done to have the scope of the subpoena narrowed. (See 5.4 of this Circular)

3. WHAT DOCUMENTS HAVE BEEN REQUESTED IN THE SUBPOENA?

The subpoena must be read very carefully to ascertain its breadth. This is critical because the institution is under an obligation to produce only those documents covered by the description set out in the subpoena. A subpoena may call for the production of health and/or non-health related records. The applicable procedures are the same.

The next task is to undertake appropriate inquiries to determine whether the health facility is in possession of any records which fall within the scope of the subpoena, the likely location of the records and the number of files that may have to be searched. A file note estimating the time that will be required to produce the records and the cost involved should be created.

Where files are located containing documents which fall within the scope of the subpoena, care should be taken to ensure that only those documents which fall within the subpoena are collated for the purposes of copying and production.

Documents that do not come within the scope of the subpoena should be removed from the medical record before documents are sent to court. A clear record of which documents have and have not been produced and a copy of the subpoena should be kept by the health facility.

3.1 Could any of the documents which have been requested in the subpoena be classified as sensitive?

The prime criterion of sensitivity is whether the data subject would consider the data sensitive. Examples of sensitive records include: sexual assault, drug and alcohol, HIV/AIDS, domestic violence, mental health and records of children considered to be at risk and records containing information on other persons.

The grounds for challenging a subpoena are set out in point 4 of this Circular. Additional precautions that may be taken in the case of sensitive records are set out in point 6 of this Circular.

3.2 What if there are no documents?

If there are no records, a letter should be written to the Court advising the Court that there are no records to be produced. This letter should be copied to the solicitor who requested the issue of the subpoena. The conduct money may be retained.

However, if there are no records but there is evidence that there were relevant records that have been lost or misplaced, then the Court should be advised that there are no records to be produced and the conduct money should be refunded. A file note should be created outlining efforts made to find the relevant records.

4. ON WHAT GROUNDS CAN A SUBPOENA BE CHALLENGED?

A person can apply to a court to seek to have a subpoena set aside altogether or have its scope narrowed. The usual grounds are:

4.1 Abuse of process

A subpoena that has been issued for reasons other than for the purpose of obtaining relevant evidence for the proceedings may be set aside.

4.2 Oppression

A subpoena may be set aside where its terms are so wide and insufficiently precise that compliance (ie collation and production of documents) would impose an onerous obligation on the health facility or where a subpoena is used for the purpose of “fishing” for information which a party hopes, but does not reasonably expect is in existence.

4.3 Public interest immunity

Where the public interest that would be served by withholding certain documents is so strong that it overrides the public interest in the following of due process, a subpoena may be set aside. A challenge on this basis applies only to very limited types of documents and will usually only be available to documents which may affect national security or some other extraordinary public interest.

NB If you wish to challenge a subpoena on a public interest immunity basis, you should contact the Legal Branch on telephone (02) 9391 9616.

4.4 Privilege

4.4.1 Legal professional privilege

Legal professional privilege only protects solicitor/client communications.

4.4.2 Privileges under the Evidence Amendment (Confidential Communications) Act 1997

The "sexual assault communications privilege" and the "professional confidential relationship privilege" have been created under the Evidence Amendment (Confidential Communications) Act 1997.
in recognition of the harm that may be caused to patients when confidential treatment notes are used in court hearings.

Can the "sexual assault communications" and the "professional confidential relationship" privileges be claimed in all courts?

These privileges can be claimed in all NSW courts. The privileges do not apply in other States and Territories or Federal Courts such as the Family Court.

When did the Evidence (Confidential Communications) Act commence?

The legislation which created the privileges commenced operation on 1 January 1998. It does not apply to hearings that had already started before that date. Therefore, some subpoenas may continue to be received to which the privileges cannot be applied although this will become increasingly rare. If the trial started after 1 January 1998 the privileges will apply.

A. Sexual assault communications privilege

The sexual assault communications privilege creates a presumption that communications made between a counsellor and a person who has been sexually assaulted are not admissible as evidence. The onus is then on the accused to argue that the material would be likely to substantially assist in their defence and that the evidence could not be obtained from alternative sources.

This privilege can apply to any counselling communications and not just to counselling following the assault (eg the privilege will apply to drug and alcohol counselling received prior to the assault).

For the evidence to be admitted it must be demonstrated that the value of the information to the defence substantially outweighs both the public interest in protecting the confidentiality of sexual assault counselling relationships and the risk of harm to the patient that may be caused by disclosure.

Only those parts of the information which pass this test will be disclosed to the defence and the judge can prevent the disclosure to the accused of details which might identify the patient's whereabouts.

It is to be emphasised that any person who counsels a victim of sexual assault or controls the records of victims should be aware of their obligations not to give evidence or hand over documents without either:

(i) the patient's consent in writing if the patient chooses to waive the privilege; or

(ii) a direction of the Court on the return date that the documents be produced after the health facility has challenged the subpoena on the ground of the sexual assault communications privilege.

It is imperative that when a subpoena involving sexual assault counselling records is received that the patient and the treatment unit which provided the care be contacted immediately. When telling the patient of the subpoena the patient should be:

(i) informed about the privilege and its implications;

(ii) asked whether he/she will waive the privilege; and

(iii) advised of the steps being taken by the health service.

Guidelines on the sexual assault communications privilege are available from the Women's Legal Resources Centre (tel (02) 9637 5012 and fax (02) 9682 3844)

B. <u>Professional confidential relationship privilege</u>

Courts now also have the discretion to exclude evidence of confidential communications which have been made by patients to health professionals. They are called "protected confidences". The privilege is much more limited than that which applies to sexual assault records discussed above.

A court must give a direction that evidence of a "protected confidence" is not to be admitted if it is satisfied that:

(i) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the patient if the evidence were admitted ; and

(ii) the nature and extent of the harm outweighs the desirability of the evidence being given.

In determining whether or not to admit evidence of a "protected confidence", the Court must consider a range of factors including:

- the strength and importance of the "protected confidence" to the proceedings;
- the nature and the gravity of the dispute before the Court;
- the availability of any other evidence to which the "protected confidence" relates;
- the likely effect (including any likelihood of harm) that would be caused to the confider if the "protected confidence" was divulged;
- the means available to the Court to limit the harm that is likely to be caused by divulging the "protected confidence"; and
- whether the substance of the "protected confidence" has already been disclosed.

NB A solicitor's assistance will generally be needed to challenge a subpoena on this ground.

5. PROCEDURES FOR RESPONDING TO A SUBPOENA

5.1 Should I notify anyone of the subpoena?

The senior health care provider and the treating health care provider are to be advised (where possible) of the subpoena of health records if neither they nor the health facility are party to the proceedings.

Where a patient whose health record has been subpoenaed is not named on the subpoena as a party to the proceedings before the Court, he or she should be notified by the health facility that the subpoena has been received and advised of the "return date" on the subpoena (ie the date the documents must be provided to the Court) in sufficient time to allow the patient to arrange to attend the Court if the patient wishes. A note should be made outlining measures taken to advise the patient of the subpoena.

NB If you have concerns about the scope of a subpoena you should consult your immediate manager and obtain advice from the health service's solicitors if appropriate.

5.2 Are photocopies sufficient or must originals be produced?

Upon receipt of a subpoena, the designated officer should investigate the possibility of supplying a copy of the original record. Some subpoenas will state that photocopies are acceptable. If not, you should check with the solicitor who requested the issue of the subpoena. In most circumstances a copy will be sufficient, ensuring that the original record can be retained on file. If the solicitor insists on originals, they must be produced. Where originals are required, the records should be forwarded to the Court and a complete copy kept on the health facility file.

5.3 Procedure for delivering subpoenaed documents to the Court

Documents produced under subpoena must be produced to the Court at the address referred to in the subpoena and <u>not</u> to the parties' legal representatives.

Documents produced on subpoena should be delivered to the Registrar or Clerk of the Court in question. They should be:

(i) sealed in an envelope;
(ii) the health facility should allocate a unique number to the envelope from a register held by the health facility in which the name of the patient, the Court to which the record is sent and the date of the hearing should be entered against the number;
(iii) a copy of the subpoena should be secured inside the envelope; and
(iv) the envelope should be delivered by hand by an employee of the health facility, registered post or courier.

On delivery, a receipt should be obtained from the Court which indicates the number of the record, the date the record was received at the Court, the name of the Court and the signature of the Court official receiving the record.

5.4 What should I do to have the scope of the subpoena narrowed?

The scope of a subpoena can be narrowed in two ways:

(i) by agreement with the party that requested the issue of the subpoena; and

(ii) by successfully challenging the subpoena in Court. (See point 4 of this Circular)

If you believe that the scope of the subpoena is too broad and calls for documents to be produced which are demonstrably not relevant to the present proceedings, an option available is to approach the solicitor who requested the issue of the subpoena with a view to seeking a compromise on the range of documents that are required. If a compromise is reached, written confirmation should be obtained from the solicitor concerned.

If the solicitor who issued the subpoena refuses to negotiate its scope as is suggested above and you still wish to challenge the subpoena having regard to the grounds upon which a subpoena may be challenged (see point 4 of this Circular), you should first consult with your immediate manager, and obtain advice from the health service's solicitors.

Health facilities have special responsibilities in relation to challenging subpoenas which call for the production of documents containing sexual assault counselling communications. These responsibilities are discussed in 4.4.2A of this Circular.

You should be aware that where a subpoena is challenged unsuccessfully, the health facility may be liable to pay the Court costs (associated with argument over the subpoena) of the party which issued the subpoena.

5.5 Procedures for challenging a subpoena in court

A solicitor's assistance may be necessary depending on the complexity of the case.

In addition to the requirements set out in points 5.1 ("Should I notify anyone of the subpoena?") and 5.3 ("Procedure for delivering subpoenaed documents to the Court") of this Circular, if a health facility is to challenge a subpoena the following procedures will also apply:

(i) Seal the documents in an enveloped clearly marked "JUDGE ONLY - PRODUCTION OF DOCUMENTS OBJECTED TO"

(ii) If the ground for challenging the subpoena is a privilege under the Evidence (Confidential Communications) Act mark the envelope "PRIVILEGED".

(iii) Pin a copy of the subpoena to the envelope.

(iv) Attach to the envelope a covering letter to the Judge setting out:
   (a) the ground upon which the subpoena is objected to; and
   (b) the reasons supporting the claim.

(v) Attend in person on the return date.

6. ARE THERE ANY ADDITIONAL PRECAUTIONS WHICH CAN BE TAKEN IN THE CASE OF SENSITIVE RECORDS?

Yes. In the case of records of a particularly sensitive nature, the Court may make orders restricting:

(i) who may have access to the subpoenaed documents; and
(ii) the time and circumstances in which the access is to take place

For example, Courts can give orders limiting access to the parties' legal representatives and independent experts on the condition that they give confidentiality undertakings. The responsibility for raising this issue rests with the addressee of the subpoena. The letter attached to the records should set out the concerns arising if the documents are provided in open court.

7. RETURN OF SUBPOENAED DOCUMENTS

Subpoenaed documents should be returned by the Court at the conclusion of the matter. If you have any queries contact the Clerk or Registrar of the Court.

PART C - SUBPOENAS TO GIVE EVIDENCE

1. A subpoena to give evidence will indicate the time and place a person will be required to give evidence as a witness.

2. A person who receives a subpoena should report that fact to his/her administrator/supervisor as soon as practicable.

3. A person who has been subpoenaed should contact the solicitor who requested the issue of the subpoena to:
   (i) confirm that their attendance is still required; and
   (ii) to obtain some better guidance as to when he or she might be required to give evidence.

4. If a solicitor indicates that a person's attendance is not required, this should be confirmed in writing.

Michael Reid
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