



CHIEF PSYCHIATRIST
of Western Australia



OFFICE of the CHIEF PSYCHIATRIST

Confidentiality and Information Sharing

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Introduction

- A general overview of the right and obligations of clinicians with respect to sharing patient information.
- The rights of carers, families and nominated persons to information under the *Mental Health Act 2014* (**MH Act**).
- It may be necessary to seek legal advice with respect to your specific situation.



General principles

- Able to share a patient's information with other clinicians involved in the immediate care of the patient.
- **Personal information** obtained under MH Act and *Health Services Act 2016 (HS Act)* is subject to a duty of confidentiality.
- Common law principle that information obtained under legislation may only be used for the purpose for which it was obtained, unless legislation provides otherwise.
- Under the MH Act, carers, families and nominated persons have a right to a person's information, unless the psychiatrist believes it is not in the person's best interests.



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Duty of confidentiality under the MH Act

- **Section 576** of the MH Act:
 - imposes a general duty of confidentiality.
 - prohibits disclosure, recording or using “**personal information**” obtained by a person because of their office, position, employment or engagement under or for the purposes of the MH Act – fine of \$5,000.



Definition “personal information”

- **Personal information** defined in the *Freedom of Information Act 1992* (Glossary) as:

information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead —

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample;



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Duty of confidentiality under the HS Act

- **Section 219** of the HS Act applies to clinicians carrying out functions under the HS Act.
- Very similar to section 576 of the MH Act:
 - imposes a general duty of confidentiality
 - prohibits disclosure of “**personal information**” obtained under the HS Act in the course of providing a “health service”.
 - “health service” is defined in section 7 of the HS Act as “*maintaining, improving, restoring or managing people’s physical and mental health and wellbeing*”.



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Exceptions to duty of confidentiality under the MH Act

- Prohibition does not apply to:
 - (a) **statistical or other information** that is not personal information; or
 - (b) Information disclosed, recorded or used in circumstances listed in **section 577(1) of the MH Act.**



Exceptions to duty of confidentiality under the MH Act

- **Section 577(1)** - circumstances in which **personal information** may, in good faith, be disclosed, recorded or used:
 - (a) in course of duty
 - (b) express authority under the MH Act (e.g. carers, families, nominated persons)
 - (c) under another law
 - (d) to a court (or other person or body acting judicially)
 - (e) under an order of a court (or other person or body acting judicially)
 - (f) for an investigation of a suspected offence or disciplinary matter, or the conduct of proceedings against a person
 - (g) with **consent** of the individual to whom the personal information relates
 - (h) other circumstances prescribed by the **regulations**.



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Mental Health Regulations 2015 (MH Regulations)

- **Regulation 20** - personal information may be disclosed, recorded or used:
 - where it is reasonably necessary to lessen or prevent a **serious risk to the life, health or safety of any individual**;
 - where it is reasonably necessary to lessen or prevent a **real or immediate risk of danger to the public**; and
 - to the Mental Health Tribunal for the purposes of the performance of the Mental Health Tribunal's functions.



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Exceptions to duty of confidentiality under the HS Act

- **Section 220(1)** - lists exceptions to the duty of confidentiality under that Act.
- They are very similar to those listed in section 577(1) of the MH Act.



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Health Services (Information) Regulations 2017

- **Regulation 5** - includes the circumstance where information relates to an individual who is deceased and the disclosure is in response to a written request from:
 - (i) a coroner, a coroner's registrar, a coroner's investigator or a member of the staff of a coroner's court in connection with an investigation into the death of the individual; or
 - (ii) a medical practitioner who is performing a post-mortem on the body of the individual at the direction of a coroner.



Consent to disclosure

- **Competent adult** or **mature minor** – no breach of confidentiality - disclosure must be consistent with the consent given.
- **Child** – usually consent of parent(s).
- **Incompetent adult** – consent of legal guardian.
- Person unable to give consent and no legal guardian - **substitute decision-maker** – “person responsible” - listed in *Guardianship and Administration Act 1990 s. 110ZD(3)*.
- Consent may be express (written or verbal) or implied.
- Written consent clear evidence.



Capacity to consent

- At law, an adult is presumed to be capable of having the mental capacity to consent to, or refuse, medical treatment.
- Under section 18 of the MH Act, a person has decision-making capacity if they are able to:
 - understand information or advice provided about the treatment decision
 - understand matters involved in making the treatment decision and the effect of the decision
 - weigh up these factors for the purpose of making the treatment decision
 - communicate the treatment decision in some way.
- Section 9 MH Act – requirement to:
 - use language, and a form of communication and terms that the person is likely to understand; and
 - use any means of communication that is practicable; and
 - Use an interpreter if necessary and practicable.



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Valid consent

- Consent must be:
 - (a) be given freely and voluntarily
 - (b) be given by a person who is legally competent and capable of consenting – the person; their legal guardian; person responsible
 - (c) be informed - what is proposed, and any risks involved, and any alternative action.
- Mature minor – proper assessment of child's maturity and ability to understand treatment proposed.



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Disclosure of information to warn of risk

- High threshold - MH Regulations regulation 20; *Health Services (Information) Regulations* regulation 5 authorise disclosure:
 - (a) where it is reasonably necessary to lessen or prevent a **serious risk to the life, health or safety** of any **individual**;
 - (b) where it is reasonably necessary to lessen or prevent a **real or immediate risk of danger to the public**.



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Public Interest

- In Australia, information may generally be disclosed if the information relates to a **serious wrongdoing** which it is in the public interest to disclose, or if its disclosure will **avoid threatened serious harm** to the public generally or to particular individuals.



Rights of carers and families

- Any carer or close family member of a patient is **entitled to be provided with information** relating to the patient's treatment and care (MH Act s. 285).
- Patient does not have the capacity to consent - carer or close family member is **entitled to be provided with information**, unless the patient's psychiatrist believes it is not in the patient's best interest (MH Act ss. 289 and 292).
- Involuntary patient or a mentally impaired accused with capacity to consent - refuses to provide consent - carer or close family member **not** entitled to be provided with information if the patient's psychiatrist considers the refusal is reasonable (MH Act s. 288).



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Rights of nominated persons

- A patient's nominated person is **entitled to be provided with information** relating to a patient's treatment and care (MH Act s. 266).
- If the patient's psychiatrist reasonably believes it is not in the best interests of the patient, the patient's nominated person may not be able to access information relating to the patient's treatment and care (MH Act s. 269)



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Requests for information by the police

- Person brought into hospital or other place to be assessed for referral for examination by a psychiatrist - decision not to refer the person, or detention period expires:
 - police **must** be notified (MH Act s. 158).
- Police officer calls requesting information about a patient stating that it is for the purpose an investigation of a suspected offence:
 - Information **may** be disclosed (MH Act s. 577; HS Act s. 220)
 - **Recommend asking police officer to put the request in writing.**