Exchanging information with other organisations concerning the safety, welfare or wellbeing of children or young people

What’s new?

Changes have been made to the law to allow certain child related organisations to exchange information concerning the safety, welfare and wellbeing of children and young people.

The new provisions are contained in Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998.

Why have the changes been made?

The Wood Special Commission of Inquiry into Child Protection Services in NSW (2008) showed that vulnerable children may need assistance from multiple sources. The Commission found that privacy laws were posing a barrier to interagency cooperation. It therefore recommended new legislation to overcome this.

Important underlying principles are that:

- agencies with responsibilities for children or young people should be able to provide and receive information that promotes their safety, welfare or wellbeing,
- agencies should work collaboratively and respect each other’s functions and expertise, and
- because the safety, welfare and wellbeing of children and young people are paramount, the needs and interests of children and young people, and of their families, in receiving services take precedence over the protection of confidentiality or of an individual’s privacy.

What are the new information exchange powers?

A relevant organisation (a “prescribed body” – see below) is now permitted to give another prescribed body information it reasonably believes would be helpful for the safety, welfare or wellbeing of a child or young person.

A prescribed body can also request information from another prescribed body, and the second body must provide the information if it reasonably believes the information may assist the requesting body to:

- make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or wellbeing of the child or young person or class of children or young persons; or
- manage any risk to the child or young person (or class of children or young persons) that might arise in the agency’s capacity as an employer, government department or organisation accredited to arrange provision of out-of-home care.
What kind of information can be provided or requested?

This can include information about:

- a child or young person’s history or circumstances including educational records, student welfare records or counselling records
- a parent or other family member
- any person/s having a significant or relevant relationship with a child or young person
- the facts surrounding whether a person poses a risk to the safety, welfare or wellbeing of a child or young person
- the agency’s dealings with the child or young person, including past support or service arrangements

All these kinds of information are subject to the exceptions set out below.

Which organisations are covered by the new information exchange law?

The information exchange provisions apply to “prescribed bodies”. Generally, prescribed bodies are:

- NSW Police Force
- a government department or a public authority
- a government school or a registered non-government school
- a public health organisation or a private hospital
- nurses, registered medical practitioners, registered midwives, registered psychologists, persons registered under the Health Practitioner Regulation National Law to practice as occupational therapists (other than students) and speech pathologists eligible for membership of Speech Pathology Australia.
- a private fostering agency or a private adoption agency
- any agencies that still provide a residential child care centre or a child care service under the Children (Care and Protection) Act 1987
- any other organisations that have direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly to children.

So within the department of Education, the department as a whole and individual schools are “prescribed bodies”.

What should I do if I need to make contact with a nurse, registered medical practitioner, registered midwife, registered psychologist, occupational therapist or speech pathologist?

As the Children and Young Persons (Care and Protection) Regulation 2012 was only amended in 2016 to make these professions “prescribed bodies” it is possible many of these health care providers may be unaware they are now prescribed bodies.

If you require assistance when requesting and exchanging information with a student’s GP or private psychologist (or other health workers in the categories listed above) please contact the department’s Child Wellbeing unit on (02) 9269 9400 for advice and support.

What requirements must be met for a school or other area of the department, to validly provide information to another prescribed body?

To provide information to another prescribed body, a government school or other area of the department, must reasonably believe it would assist the recipient body to:

- make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or wellbeing of the child or young person or class of children or young persons; or
- to manage any risk to the child or young person (or class of children or young persons) that might arise in the agency’s capacity as an employer, government department or organisation accredited to arrange provision of out-of-home care.

It is not necessary for the school or other area of the department, to receive a request from the recipient body in order for the provision of information to be lawful.
What requirements must be met for a school or other area of the department, to be required to give information to another prescribed body?

A school or other area of the department, that receives a request for relevant information from another prescribed body must provide it if it reasonably believes (having been provided with sufficient information to form that belief) that the information may assist the requesting body to one of the child protection purposes referred to in the previous question.

However, the school or other area of the department, is not required to provide certain kinds of information (see next question).

When can a request for information from another body be refused?

A school or other area of the department is not obliged to provide any information requested if it reasonably believes it would:

- prejudice the investigation of any breach (or possible breach) of a law
- prejudice a coronial inquest or inquiry
- prejudice any care proceedings
- contravene any legal professional or client legal privilege
- enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained
- endanger a person's life or physical safety
- prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a breach (or possible breach) of a law, or
- not be in the public interest.

In particular, information as to the identity of a mandatory reporter must not be exchanged.

A request from another prescribed body can also be refused if the school or other area of the department, does not believe the information requested would assist the requesting body for a relevant purpose.

How do I decide if releasing information would not be “in the public interest”?

Information may only be withheld on this basis if the school or other area of the department, considers that the public interest in withholding the information is greater than the public interest in disclosing it. In considering whether release is against the public interest the decision-maker needs to give paramount consideration to the safety, welfare and wellbeing of the child.

- Where serious consideration is being given to withholding information on this basis the school or other area of the department should (if appropriate) discuss the concern with the body making the request.
- Before refusing a request on this basis the school, or other area of the department should discuss the situation with an appropriate line manager.

What do we need to do if we decide to decline a request?

The school, or other area of the department, must give notice in writing to the requesting body, and state the reasons for not providing the requested information. A copy of the letter must be kept in a secure file by an appropriate manager e.g. school principal.

A template letter is provided here.

When should schools or other areas of the department, request information from other agencies?

Schools or other areas of the department should not go on ‘fishing expeditions’ to obtain information from other bodies. Information should be requested where the school, or other area of the department, has reason to believe the other body holds relevant information and such information would help them support the child or young person in question.

If the school, or other area of the department, wishes to request information from another prescribed body, it is recommended the attached template letter be used.
Is the consent of the child, young person or family necessary to exchange information?

No. The information exchange powers allow information to be provided without consent. However, it is good practice to seek consent from the child, young person or parents unless there are reasons why this is not possible or appropriate.

Is it necessary for there to be significant harm in order for information exchange to be defensible?

No.

What is the duty to cooperate with other organisations?

Schools and other areas of the department are under a duty to coordinate with other prescribed bodies in the provision of services for children and young people.

Will staff that provide information be in breach of professional or ethical obligations (e.g. school counsellors)?

No. Provided staff act in good faith they will be protected from any civil, criminal or disciplinary action for providing the information. Nor can they be held to have breached any code of professional ethics or standards of professional conduct.

Must information we obtain under these provisions be kept securely?

Yes. Any information received by a prescribed body under the new law must not be used or disclosed, unless that use or disclosure is itself required or permitted by law.

Schools and other areas of the department need to take such security safeguards as are reasonable in the circumstances so that such information is only available to those within the school or other area of the department who need it in order to support the relevant child or young person or for some other lawful purpose.

Can information be shared in meetings with other prescribed bodies?

Yes. Information can be given orally or in writing. If meeting notes outline the information exchanged then these notes should be kept securely. If a request for information at a meeting is refused, written notice of this refusal must subsequently be given in the same way as indicated earlier in this bulletin.

What about privacy legislation?

Privacy laws do not prevent information exchange under the new law.

Will Family & Community Services still have an independent right to obtain and provide information?

Yes. Family & Community Services can still use its existing powers under the *Children and Young Persons (Care and Protection) Act 1998* to require a school, or other area of the department to provide information. [See Legal Issues Bulletin No. 47 – Requests for information from other government agencies].

What happens if there is a dispute between bodies about whether to provide information?

This must be handled in accordance with the department's policies and the *Child Wellbeing and Child Protection – NSW Interagency Guidelines*.

Can the new information exchange powers be used to obtain information about risks to staff?

No, unless it is also information that relates to the safety, welfare and wellbeing of children and young people.
Should the information exchange powers be used to obtain information about school students with a history of violence?

No. There is a separate power under part 5A of the Education Act 1990 to obtain information of this kind. This is subject to the Management of health and safety risks posed to schools by a student's violent behaviour guidelines.

Can the information exchange provisions be used to obtain information about risks that staff, or potential staff, may pose to students?

Yes.

Can information be exchanged with people or organisations outside of NSW?

While some Commonwealth agencies fall within the definition of prescribed bodies it does not include those that are located in other States or Territories and so there is no provision for the exchange of information with these bodies under the new legislation. While there is nothing to prevent an interstate agency being asked to provide relevant information, there is no obligation on that agency to provide a response.

The capacity of interstate agencies to provide information when asked will depend largely on the provisions of any privacy legislation applicable in the particular State or Territory and the application of section 19(2) of the Privacy and Personal Information Protection Act 1998 (which deals with the transfer of information to other states, Commonwealth agencies and overseas.

Advice should be sought from Legal Services on 9561 8538 if a request is made to provide information to another State or Territory.

Where can I get more information about contacting the Child Wellbeing unit or Reporting to Community Services?

The Child Wellbeing unit has developed fact sheets providing information about Contacting the Child Wellbeing unit and Reporting to Community Services.
About Legal Services

Legal Services is here to support our government schools. Staff can contact Legal Services by email or phone.

Legal Services can only provide legal advice to departmental staff. It is not able to provide legal advice or assistance to parents, students or members of the public due to the potential for a conflict of interest.