



# Legal Issues Bulletin

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## SCHOOL COUNSELLORS, CONFIDENTIALITY AND THE LAW

### What issues does this bulletin address?

This bulletin examines the circumstances where there is a legal obligation to disclose confidential counsellor information and circumstances in which a student's confidential counsellor information can be disclosed to a person with legal authority to act on behalf of a student.

Advice on confidentiality can also be found in the School Counsellor Manual, Section 5.11 "Confidentiality and School Counsellors".

Information obtained in a confidential counselling context can be disclosed to others with the student's or parent's (as appropriate) informed consent. This bulletin does not deal with the issue of informed consent. Advice regarding consent in the context of working with children and young people is available in the Australian Psychological Society's "Guidelines for Working with Young People".

### What is the legal context to counsellor confidentiality and what do some of the terms used in this bulletin mean?

Counsellor confidentiality is a complex area which is affected by a range of legislation. In New South Wales privacy laws apply to all State government agencies and their employees including school counsellors. The two major acts are the [Privacy and Personal Information Protection Act 1998](#) and the [Health Records and Information Privacy Act 2002](#).

The **Privacy and Personal Information Protection Act** relates to the collection, use and disclosure of personal information. 'Personal information' is defined very broadly in the Act to mean "information or opinion about an individual whose identity is apparent or can be reasonably ascertained from the information or opinion".

The **Health Records and Information Privacy Act** deals with the collection, use and disclosure of health information. '**Health information**' is also broadly defined to mean **personal information that is information or opinion about the physical or mental health or a disability of an individual**. The Health Records and Information Privacy Act also applies to both public and private sector health service providers.

A range of more detailed information about New South Wales privacy legislation and its application to the department is available on the Legal Services intranet site at <https://education.nsw.gov.au/legal/privacy>.

In this bulletin information obtained in the context of a confidential counselling relationship is referred to as confidential counsellor information.

The term 'confidentiality' is used to refer to the professional obligation of counsellors not to disclose to others information obtained in the context of a confidential counselling relationship.

Use of the word 'privacy' is a reference to the rights and obligations under New South Wales privacy legislation mentioned above.

## What is the ethical context to school counsellor confidentiality?

The obligation of confidentiality is central to the practice of the profession of psychology. The assurance of confidentiality given by psychologists to clients is very important in enabling the psychologist-client relationship to work effectively. This principle applies to the work of school counsellors.

The department of Education and requires new appointees to school counselling positions be eligible for registration as a psychologist with the Psychology Board of Australia. The registration of psychologists is governed by the National Health Practitioner legislation and the Psychology Board of Australia (the Board) <http://www.psychologyboard.gov.au>.

The Board advises that the standards of psychologists are governed by the Code of Ethics of the Australian Psychological Society <https://www.psychology.org.au/About-Us/What-we-do/ethics-and-practice-standards>. The Australian Psychological Society's Code of Ethics identifies the circumstances under which psychologists may disclose confidential information obtained in the course of their provision of psychological services.

The key relevant part of the Australian Psychological Society's Code of Ethics, Clause A.5.2, states:

A.5.2 Psychologists disclose confidential information obtained in the course of their provision of psychological services only under any one or more of the following circumstances:

- with the consent of the relevant client or a person with legal authority to act on behalf of the client,
- where there is a legal obligation to do so

## In what situations may there be a legal obligation to disclose confidential counsellor information?

**The following paragraphs outline those situations and relate when exceptions may apply. Previously issued legal issues bulletins are referred to where relevant and further information is given of specific relevance to counsellors.**

### Subpoenas

Generally, if documents containing confidential counsellor information are required by the terms of a subpoena they must be produced to the court.

[Legal Issues Bulletin No 25 - Subpoenas](#) provides advice regarding steps to be taken when a subpoena is served and refers to action to be taken by school counsellors in respect of school counsellor files. It is important counsellors determine precisely which documents are required by the terms of the subpoena. It is not necessary to create documents in order to answer a subpoena. If counsellors are in doubt as to which documents are required they should contact Legal Services for advice. Counsellors should not produce documents containing confidential counsellor information that are not covered by the terms of the subpoena.

### Exceptions

Confidential counsellor material may attract the exception of a protected confidence where the subpoena has been issued in criminal proceedings and the material sought relates to the victim of a sexual assault. [Legal Issues Bulletin No 23 - Protected confidences in relation to School counsellor files concerning victims of sexual assault – update](#) provides advice in relation to protected confidences. Another exception applies when the documents sought under subpoena relate to reports regarding children and young persons at risk of harm. School counsellors and other staff members usually make reports to the department of Family and Community Services through the school principal but there may be circumstances where they make a report in good faith to the department of Family and Community Services or to a person who has the power or responsibility to protect the child or young person. Generally the counsellor or staff member cannot be compelled to produce the report or a copy of, or extract from it, or to disclose or give evidence of any of its contents. The same protection applies to a referral made to the Child Wellbeing unit. [Legal Issues Bulletin 25 - Subpoenas](#) deals with this exception. However there are some proceedings in which this exception does not apply. Additional advice may need to be sought from Legal Services in this area.

## Sharing information with other agencies in accordance with Chapter 16A Children and Young Persons (Care and Protection) Act 1998 (“Chapter 16A”)

Under [Section 245D of Chapter 16A](#) a prescribed body (“the requesting agency”) may **request** the department to provide it with any information held by the department that relates to the safety, welfare or wellbeing of a particular child or young person. If the department receives such a request it is required to comply if it reasonably believes the information requested may assist the requesting agency for any purpose specified in the section. The purposes specified include making any decision, assessment or plan or conducting any investigation or providing any service relating to the safety, welfare or wellbeing of the child or young person. If the confidential counsellor information is captured by the request, then it must be supplied. Where psychological information might be misinterpreted by the requesting agency consideration should be given to the way in which that information is supplied. Advice on this can be sought from Senior Psychologists/District Guidance Officers.

### Exception

There is a “public interest” exception to the obligation to provide the information requested. For example if provision of the information might damage or undermine the relationship between the counsellor and the student, it may be against the public interest to provide it. This has to be weighed with relevant considerations regarding the safety, welfare or wellbeing of the student. If a counsellor thinks this exception may apply in a particular case, advice should be sought from Senior Psychologists//District Guidance Officers.

Under [Section 245C of Chapter 16A](#) a prescribed body (including a school) may, **without a request**, provide information relating to the safety, welfare or wellbeing of a child or young person to another prescribed body if the prescribed body reasonably believes the provision of information would assist the recipient for a purpose consistent with that section. The purposes specified include making any decision, assessment or plan or conducting any investigation or providing any service relating to the safety, welfare or wellbeing of the child or young person. A school counsellor may provide confidential counsellor information in these circumstances. A person acting in good faith providing information in accordance with Chapter 16A cannot be held to have breached any code of professional ethics or departed from any accepted standards of professional conduct. [Legal Issues Bulletin No 50. - Exchanging Information with other Organisations Concerning the Safety, Welfare or Wellbeing of Children or Young People](#) provides advice in relation to the disclosure of information in accordance with Chapter 16A.

## Disclosure in accordance with a request by the department of Family and Community Services under Section 248 Children and Young Persons (Care and Protection) Act 1998 (“Section 248”)

[Section 248](#) empowers the department of Family and Community Services to obtain information relating to the safety, welfare and wellbeing of a particular child or young person from a school (or other prescribed body). If confidential counsellor information is captured by the request, then it must be supplied. A person acting in good faith providing information in accordance with section 248 cannot be held to have breached any code of professional ethics or departed from any accepted standards of professional conduct. [Legal Issues Bulletin No 47 - Requests for Information from Other Government Agencies](#) provides further advice in relation to requests made by the department of Family and Community Services under Section 248.

### Notification of risk of harm regarding children and young persons

Under child protection legislation and the department’s procedures [Protecting and Supporting Children and Young People](#) (the procedures), where any departmental employee, including a counsellor, has reasonable grounds to suspect a child or young person is at **risk of significant harm**, and the grounds arise in the course of the employee’s work, a report must be made to the department of Family and Community Services. Where the employee has reported it to the principal or workplace manager he/she must ensure the principal or workplace manager has reported it to the department of Family and Community Services. If the employee believes the principal or workplace manager has not made the report and still has concerns about risk of significant harm, the employee must report it to Family and Community Services directly. Where information giving rise to a counsellor forming the view there are reasonable grounds to suspect a child or young person is at risk of significant harm, is confidential counsellor information, this is not a basis for failing to report.

Where an employee has reasonable grounds to suspect a child is at **risk of harm (less than a risk of significant harm)** and those grounds arise in the course of the employee’s work, the employee must report it to the principal or workplace manager. The principal or workplace manager must then take appropriate action in accordance with the procedures. Where there is doubt about whether the risk of harm is significant the procedures must be followed. The fact information giving rise

to a counsellor forming the view there are reasonable grounds to suspect a child or young person is at risk of harm is confidential counsellor information, is not a basis for failing to report to the principal or workplace manager.

### Reporting improper conduct of a staff member

The department has a duty to provide a safe educational environment for children and young people. That duty includes responding to allegations of a child protection nature made against employees, including volunteers, with respect to children and young persons.

[Child protection, procedures for responding to allegations against employees](#) sets out the procedures to be followed in response to such allegations. They reflect legislative requirements upon the department to report to the department of Family and Community Services, the NSW Ombudsman, the Commission for Children and Young People and the Independent Commission Against Corruption. If there is an allegation (including an anonymous allegation) of a child protection nature against an employee the principal or workplace manager must be informed. If the allegation is against the principal or workplace manager, their supervisor must be informed. The fact the allegations against an employee, including against a volunteer, is confidential counsellor information, is not a ground for failing to report to the principal or workplace manager nor to the supervisor.

### Disclosure of information about a student who represents a risk of injury to themselves or others

The department and all school staff including counsellors have obligations relating to duty of care and work health and safety. Sometimes a student will disclose information to a counsellor that gives rise to concerns about the safety of the student, of other students and/or of staff. (For advice about confidential counsellor information and children at risk of harm see **“Notification of risk of harm regarding children and young persons”** above)

Counsellors need to exercise careful judgement when deciding whether confidential counsellor information should be disclosed to the principal, workplace manager or others who need to know because of safety concerns. In coming to a decision counsellors need to consider a number of matters including:

- the seriousness of potential injury should the risk to safety materialise, and the likelihood of the risk materialising,
- whether the information is relevant to the risk of injury,
- whether the risk is real and proximate not hypothetical or remote. A risk is remote and hypothetical when, for example, it is contingent upon other unlikely events, and
- the currency of the risk.

For example, a student discloses to a counsellor in a confidential counselling context that he is about to attend a practical class where powered machinery will be used and he is under the influence of prescription medication that is making him dizzy. The counsellor’s evaluation of the risk in the circumstances is: (i) there is a risk that could give rise to serious injury and its materialisation is reasonably likely (ii) the fact the student is under the influence of medication that is making him dizzy is relevant to the risk arising from the machinery, (iii) the risk to the student or to other students or staff is real and not too remote, and (iv) the risk is current. In such circumstance information sufficient to inform action should be disclosed to those who need to know in order that safety can be maintained.

Section 5.11 of the School Counsellor Manual “Confidentiality and School Counsellors” states circumstances “where one or more individuals may experience serious harm if someone with the power to act is not informed” include: (i) threat of harm by a student to self or others (for example suicide or anticipated violence) (ii) pregnancy of a student under 16 years of age (iii) use and/or possession of illegal substances at school or at a school related activity. In these circumstances information sufficient to inform action must be disclosed to persons who need to know.

### Students who disclose anti-social and extremist views during a counselling session.

As a matter of good practice a school counsellor should advise students there may be circumstances in which it may be necessary to tell someone about information the student provides during a counselling session.

If a student discloses anti-social and extremist views during a counselling session it is reasonable to assume the student may pose a risk to himself or herself, other students or staff. This gives rise to a legal obligation to assess and manage that risk. Depending on the nature of the disclosure the school counsellor may also form the view a criminal offence may have been or may be committed.

Accordingly if a student discloses anti-social and extremist views during a counselling session the school counsellor must promptly inform the school principal. If the principal is absent from the school, the school counsellor must notify the next most senior staff member present at the school.

In situations of imminent risk the principal (or senior staff member) should call Triple Zero (000) and then report the incident to the School Safety and Response unit. In all other circumstances the principal (or senior staff member) must call the School Safety and Response unit as soon as possible.

Further information about students who disclose anti-social and extremist views, including the definition of those terms, can be found on the [Work Health and Safety directorate's Communities Working Together](#) webpage. What if the student discloses extremist views but the school counsellor is unsure whether the student also has anti-social views? The school counsellor must promptly inform the principal (or if the principal is absent the senior staff member at the school) of the student's disclosure. The principal (or senior staff member) should then contact School Safety and Response unit for advice.

## Disclosure under part 5A Education Act

Part 5A, Division 2 of the [Education Act 1990](#) ("Part 5A") provides that the department, a non-government schools authority, a government school or a registered non-government school may request a school to provide information about a particular student that would assist in:

- assessing whether the enrolment of the student is likely to constitute a risk (because of the behaviour of the student) to the health and safety of any student (including the student) and
- developing and maintaining strategies to eliminate or minimise any such risk.

If confidential counsellor information is caught by a request made under part 5A then it must be provided. However Part 5A does not require the disclosure of information about the identity of a person who has made a notification to the department of Family and Community Services concerning a child or young person at risk of harm.

## Reporting knowledge of a serious criminal offence

If someone knows or believes a person has committed a serious criminal offence (an offence punishable by imprisonment for 5 years or more) and he/she has information that might be of material assistance, it must be reported to the police unless there is a reasonable excuse not to report. The fact the knowledge or belief was formed or the information was obtained in a confidential counselling relationship is not of itself a reasonable excuse for failing to report. Prosecution of persons from certain categories of professionals including counsellors, for failure to report a serious criminal offence cannot occur without the approval of the Attorney General.

## What if I disclose information when not actually required?

Disclosure of information not required by the terms of the request or not otherwise legally required could constitute a breach of the student's confidentiality and privacy. Care needs to be taken in deciding whether the information is required by the terms of the request or circumstances and requires disclosure.

## Can I disclose confidential counsellor information to other departmental staff?

Generally, the disclosure of confidential counsellor information to non-counselling staff, including executive staff, is a breach of the student's confidentiality and privacy. Non-counselling staff, including executive staff, should not request the disclosure of counsellor confidential information unless legal or policy obligations require it. **This advice does not at all negate the practice where counsellors, with the student or parent's (as appropriate) consent, make appropriate disclosures to staff or others to support the student's educational success and wellbeing.**

Notwithstanding the confidential nature of a counsellor's role it is important for counsellors to keep their school principal informed about their work in general terms including negotiating and evaluating work plans.

## In what circumstances can confidential counsellor information be disclosed to a person with legal authority to act on behalf of the student?

Generally parents and caregivers have legal authority to act on behalf of a child in matters concerning the child's schooling. If in a particular case a question arises about disclosure of confidential counsellor information to a parent or caregiver who may not have legal authority to act on behalf of a child, advice should be sought from Legal Services.

The department's [Privacy Code of Practice](#) made under the Privacy and Personal Information Protection Act provides that when it is in the best interests of a preschool or primary aged student, or student with a significant intellectual disability, and where the student has been referred to a counsellor by a parent or caregiver, the counsellor may disclose personal information to the parent or caregiver without breaching the student's privacy. Disclosure of personal information to the parent or caregiver in these circumstances is also not a breach of the student's confidentiality.

However if the information is health information the counsellor may only disclose it to an "authorised representative" of a student if the student is incapable by reason of age, illness, injury, physical or mental impairment of understanding the general nature and effect of the Health Records and Personal Information Protection Act or of communicating their intentions with respect to the Act. An authorised representative includes a person with parental responsibility for the student.

If the school initiates individual psychological or educational assessment, parental permission should be obtained for a school student of any age (see Section 2.1.3 of the School Counsellor Manual "Referral and Reporting Procedures") and the parents/caregivers should be informed of the outcome of the assessment. Parental/caregiver permission should also be obtained for any significant therapeutic interventions and they should be informed of the outcome of any such interventions.

## What should I do if I am in doubt about whether to disclose information?

Issues in this area can be complex. If counsellors are in doubt advice should be sought from Legal Services. It is not a breach of confidentiality or of privacy to seek such advice from Legal Services. However a legal officer should only be provided with the information they need to know in order to properly advise.

## 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.