



Confidentiality

This sheet is intended to provide general information only, not advice. If you have a particular legal problem you should contact a solicitor. The Youth Advocacy Centre does not accept responsibility for any action arising out of reliance on this information. This section was last updated on 10 September 2020. This legal information is relevant to Queensland, Australia.

Confidentiality

For many workers, confidentiality is an important principle by which they work. They believe that in order to work effectively with a person, there must be a relationship based on trust. One way to establish this trust is to be clear that what is said between the person and the worker will be kept confidential and therefore not discussed with another party.

However, this is not simply a desirable work ethic, it is also the law.

Where a person (the confider) gives particular information within their knowledge or control to another (the confidante) in circumstances in which:

- a) the confider would expect that that information would not be repeated; and
 - b) the information is confidential in nature (for example, it is not simply “gossip”);
- then there is a legal obligation on the confidante not to pass that information on to a third party. Indeed, if the confidante does this, they could be sued by the confider¹.

Examples of this would be where a person talks to a counsellor to talk to them about their marriage difficulties or where a person sees a solicitor to obtain legal advice about a road traffic accident in which they have been involved.

Exceptions to the duty of confidentiality include:

- the confider has agreed that the information can be discussed with a third party - this will often happen as otherwise it is impossible to advocate on the client’s behalf, (consent);
- there is a law which says that you must pass on the information - for example, there is legislation which states that medical practitioners must report suspected child abuse matters irrespective of client confidentiality, (law);
- there is an immediate, serious and identifiable risk - for example, a client comes to the office with a weapon and states that they are going down to the local tax office “to teach that Smith a lesson”; or a client indicates they have the opportunity and the appropriate resources to commit suicide and intend to proceed at that time, (public interest exception); and
- in court proceedings (subpoena). This is discussed in more detail below.

What if the person confiding the information is a child?

Where a child is of sufficient age and maturity to understand the issues around their particular situation, the choices they have in the situation and the consequences of those choices, then if a worker agrees to work with them, the worker must also be bound by confidentiality. This is based on an English House of Lords decision, generally referred to as the *Gillick Case* and approved by the Australian High Court in a case generally referred to as *Marion’s Case*. (For further discussion about this principle and the associated cases, see the paper *Can young people under 18 make their own decisions?*)

¹ Coco v A.N Clark (Engineers) Ltd (1969) RPC 41

Article 12 of the Convention on the Rights of the Child also supports this approach assuring *“the child who is capable of forming his or her own views the right to express those views freely in all matter affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”*.

How does a worker tell whether a child is sufficiently mature? A child does not need to know about all the consequences. It is up to the worker to explain and explore the issues to the child in appropriate language. Due to the significant importance of the child’s understanding, it is necessary to use appropriate techniques to check that the child has properly understood these issues. The more complex and serious the circumstances, the decision to be made and the younger the child, the more a worker will need to do to be sure that an understanding exists. For example:

- using language the young person will understand;
- exploring and explaining the benefits and risks;
- asking questions to determine whether the young person shows an appreciation of the short and long term benefits and risks; and
- providing an opportunity for the young person to explain their understanding in their own way.

“Understanding” includes appreciating the possible consequences and impacts of the decision in both the short and long term.

For example, asking a 6 year old whether they want to go to the park or the library is something quite within the comprehension of most 6 year olds and the consequences of that decision are rather insignificant. However, asking if they would like to live with their mother or father after the breakdown of a marriage would be a much more significant decision. It does not mean that the child cannot express a view, but whether that view can be given priority depends on their ability to properly understand what is happening and the consequences of their decision.

What laws require you to pass on information?

These people are usually called mandatory reporters. Many professionals think that they are mandatory reporters but they are not. Always ensure that a law (not an organisational policy) requires a worker to report certain things. Some examples of those professionals that are mandatory reporters are doctors, Commission for Children and Young People and Child Guardian, Department of Communities (youth justice and child safety).

Section 159M of the *Child Protection Act 1999* allows information sharing provisions between certain parties. A worker **may** - not must, exchange relevant information (defined as information concerning risk of harm) to delegated officers of certain government departments including Department of Communities. However, this information is not freely available to be exchanged to anyone else. It is an offence to use or disclose this information to anyone else unless it is under the exceptions of S187 of the *Child Protection Act 1999*. If workers exchange “relevant information” in the required manner then they are not liable for giving the information.²

A young person should be provided with information around reporting procedures to ensure they can be informed about what they decide to tell the worker and know where the information will go. The young person should also be informed of provisions described above relating to information sharing between government agencies and what your practise is.

² S 159 Q *Child Protection Act 1999*

Confidentiality and court proceeding

S 159 M Child Protection Act

Discretionary

• “relevant Information”

P.E	→	P.E	<input checked="" type="checkbox"/>
P.E	→	S.P	<input checked="" type="checkbox"/>
S.P	→	P.E	<input checked="" type="checkbox"/>
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P.E. Prescribed Entity as defined by *Child Protection Act 1999*

S.P. Service Provider as defined by *Child Protection Act 1999*

A person can be ordered to attend at court to give information a client has told them they have about a particular matter to the court. This could include documents in the person's possession. The only exception to this is contact between a solicitor and their client.

An order to attend court will be on an official court form called a *subpoena*. If there is simply a general request by one party involved in the case, the worker does not need to attend. Many agencies have a policy that workers will only be allowed to attend court on receipt of an official subpoena.

If a subpoena is received and the worker does not attend or produce the documents as directed, a warrant will be issued for their arrest. When asked questions in court, whether attending voluntarily or in response to a subpoena, the worker must answer those questions truthfully to the best of their ability. If they refuse to answer questions then they can be jailed for *contempt of court*. This does happen - for example, there have been cases where journalists have been jailed for failing to answer questions about the source of information they have published in media articles. Failure to answer truthfully can lead to charges of perjury.

Generally, before a person is requested to attend court as a witness, they will be asked to give an interview or make a statement setting out the information they have that is relevant to the case. A person does not have to give an interview or make a statement before they attend court - even if it is at the request of the police. If a person does not make a statement they are less likely to be asked to go to court.

Some practical points

It is useful when working with a client to be clear about your role and to only discuss what is necessary for the work being undertaken with that person. For example, if a young person tells their youth worker they have broken the law, then the young person needs assistance to obtain some legal advice about how to deal with the situation. There is no need for the worker to know specific details about what was supposed to have happened. By not knowing, youth workers can avoid being placed in the embarrassing situation of being asked what they know about the matter and running the risk of being called as a witness for the prosecution - something which may seriously jeopardise their relationship with the young person concerned and possibly other young people accessing the agency in the future.

Workers should also consider the issues of passing information on to co-workers and to workers in other agencies. Both of these situations allow for potential breaches of confidentiality.

Where workers are in a team situation, it may well be important or helpful for information to be shared about a particular client. However, a young person should be informed that this might occur and their consent should be obtained in order to allow information to be shared within the agency without breaching confidentiality. Remember, a young person can withdraw their consent (either verbally or in writing) at anytime.

Passing information to workers in other agencies is a serious matter. It is not unusual for young people to be in contact with a number of agencies to address different issues or for young people to move from agency to agency, as is often the case with youth shelters. This does not give workers the right to simply pass on the information that they know about a young person - confidentiality applies unless one of the exceptions discussed above are applicable.