

## MEDIBANK – ANSWERS TO QUESTIONS ON NOTICE FROM THE INQUIRY INTO NATIONAL OUTCOME 4 OF THE NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN

### Question:

CHAIR: As you probably heard earlier, there is a very wide range of issues that the committee is trying to work through. I will try to ask some really quick questions about them. .... Can I start by asking about the negotiations that took place with RDVSA as the previous provider of trauma counselling?

...

CHAIR: Are you saying that there were no negotiations in 2016 or that you were not aware of them?

...

CHAIR: The question I would ask, if there is anyone at the table who can talk about what happened eight months ago, is: if that was the case, why initiate an extended contract negotiation with RDVSA at all? Why not just go to market in 2016? Why did you wait until 2017 to do that?

### Answer:

Medibank's submission to the inquiry provides the history of the 1800RESPECT service, including the request for proposal process involving R&DVSA and the transition to the new panel arrangement.

The Committee is referred in particular to pages five, six and 17, which outline the broad processes and issues under negotiation in relation to the trauma specialist counselling service in 2017.

A contractual agreement with R&DVSA was signed in 2014 for the trauma specialist counselling service component of 1800RESPECT, and was due to expire on 30 June 2017.

Given the importance of the 1800RESPECT service and the necessity of ensuring ongoing service, Medibank initiated a request for proposal process in February 2017, which was four months prior to the end date for the contract with R&DVSA.

#### *Meetings in 2016*

There were discussions with R&DVSA in 2016 about the effectiveness and responsiveness of the trauma specialist counselling service they delivered and the First Response model.

These discussions:

- were part of the day-to-day process for managing their contract for the delivery of services and would be standard practice in managing any contractual arrangement between two entities, regardless of their profit or not-for-profit status;
- were undertaken in good faith by Medibank and centred on ensuring a responsive and high quality service; and
- were confidential.

Disclosing the details of precise meetings would breach their confidentiality and the good faith of both Medibank and R&DVSA.

#### *Re-Negotiation of the R&DVSA Sub-Contract in 2016*

The subcontract between Medibank and R&DVSA did not mirror the terms and conditions of the Funding Agreement between the Department and Medibank in a number of key operational respects. At the time, Medibank accepted the risks involved in having a gap between the Funding Agreement and the subcontract.

Due to the operational changes brought about by the implementation of the First Response model and resulting changes which were to be made to the Funding Agreement with the Department, Medibank sought to re-negotiate its existing subcontract with R&DVSA in the second half of 2016.

It quickly became apparent that R&DVSA was unwilling to accept a number of the requirements which were required to be flowed down from the amended Funding Agreement. Recognising that the existing subcontract was due to expire on 30 June 2017, the Department agreed that Medibank would not be considered to be in breach of its Funding Agreement if it did not flow certain terms and conditions through to the existing subcontractor, R&DVSA.

However, it was made clear that any new subcontract entered into in relation to the Funding Agreement would have to include the terms and conditions which the Department required to be flowed down.

#### *The Request for Proposal Process in 2017*

The objective of the request for proposal process was to enable a review of trauma specialist counselling skills available nationally so that Medibank could be confident it was providing the best possible trauma specialist counselling service and to understand and plan as to how it might meet future demand.

The request for proposal process also provided an opportunity to enter into a new trauma specialist counselling subcontract that more accurately reflected the subcontracting arrangements under a First Response model and the flow down requirements under the Funding Agreement.

To guarantee continuity of service whilst allowing adequate time for the request for proposal process to be finalised, Medibank extended its existing subcontract with R&DVSA to 29 October 2017. As a result, an additional \$1.92 million was paid to R&DVSA upfront to cover the period of the extension.

R&DVSA took part in the request for proposal process, and was selected as the preferred respondent on the basis of proposals received.

Although we were committed to the request for proposal process, our first priority is and has always been the effective delivery of the 1800RESPECT service, including the trauma specialist counselling service, for vulnerable Australians.

Taking into account information obtained during negotiations at the time of implementing the First Response model, information obtained during the request for proposal process, and R&DVSA's historical and actual performance outcomes, Medibank had significant concerns about the effectiveness of R&DVSA's service delivery, particularly call answer rates and waiting times.

Our submission notes that:

"The evaluation panel that considered R&DVSA's response to the request for proposal raised a number of concerns, including R&DVSA's limited capacity to address unanswered call volumes and to expand and scale the service to meet demand, as well as concerns regarding the content and rigour of R&DVSA's clinical guidelines and compliance with Australian privacy laws. Importantly, R&DVSA itself had indicated to the Australian Government that it would be unable to address the abandonment rate issue and that there would continue to be unacceptably long wait times for this important service."

Medibank has consistently and unequivocally sought R&DVSA's involvement in the delivery of trauma specialist counselling services through the new panel arrangement.

R&DVSA itself decided not to participate in the new panel arrangement.

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### Question:

Senator RICE: In terms of the Chair's specific question about what processes, what manual and what procedures they are following, are they following the RDVSA best-practice model that we have had tabled to us this morning? What have they provided to you as to what their manual and their methodology is?

...

Senator RICE: But what's there at the moment? What I hear you say is that you are going to do it collaboratively; but we've got services being provided now, so what are they using as of now?

Ms McMahon: We have the clinical governance framework in place, which is really the crux of any manual and any development that goes forward.

Senator RICE: Does that go into the sort of detail that's outlined in here?

Dr Swan: I would imagine so. Ours does not look quite as thick as that, without seeing what the content is. But it's certainly a very detailed document and it goes into all the various components of how you go about ensuring that you deliver a very person-centred, trauma-informed, evidence-based approach to how you go about addressing people that are at risk of or undergoing the types of trauma that we're trying to address.

Senator RICE: Would you be able to table a copy of that manual as it currently exists?

Ms McMahon: I can take it on notice.

Senator RICE: Can you table it? Is there a reason why you don't think you would be able to table it?

Ms McMahon: I'm happy to take it on notice. I just need to understand the commercial confidentiality of the document.

### Answer:

Medibank developed a comprehensive 'Clinical Governance Framework' for the 1800RESPECT service. This Framework details quality and service excellence standards for the service, incorporating principles of:

- A person-centric approach to counselling
- Empowerment
- Trauma informed practice
- Gendered understanding of family, domestic violence, and sexual assault
- Safety and confidentiality
- Diversity and fair access
- Service user engagement
- Coordination, collaboration, and integration
- Governance and accountability

The Clinical Governance Framework is incorporated within Medibank's best practice manual, referred to in the next question.

## MEDIBANK – ANSWERS TO QUESTIONS ON NOTICE FROM THE INQUIRY INTO NATIONAL OUTCOME 4 OF THE NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN

### Question:

Senator SINGH: What is the rationale behind your organisation producing a new best practice manual when there is already in existence a best practice manual for specialised sexual, domestic and family violence counselling?

...

Senator SINGH: Was the decision made to go down the path, the long process, of creating a new best practice manual because the existing best practice manual has the RDVSA's name on it?

Dr Swan: No.

Senator SINGH: When will a new best practice manual be complete?

Ms McMahon: The manual will be a living document that will continually be refined, improved, updated, to reflect the best clinical information.

Senator SINGH: When will it be complete? When will we have a manual that this committee can look at?

Dr Swan: We can provide you with what is currently live, what people are currently working with. As I said, that is not something that has been built overnight. It's been built from the expertise and information that we've collected for many years. What we are doing now is refining and further developing it. That is an ongoing process, but we can certainly provide you with a copy of our manual, our clinical governance framework, which is a substantial document with a lot of detail, and we can get that to you once we check issues around commercial-in-confidence. We just want to double-check that before we commit to releasing it here.

### Answer:

Medibank is committed to ensuring effective and high quality counselling through 1800RESPECT, including the trauma specialist counselling service.

Medibank's best practice manual is at Attachment A – [note this document is provided to the committee in confidence and is not for public release.](#)

As 'best practice' evolves over time, the manual will continue to be developed by Medibank in consultation with all of the trauma specialist counselling not-for-profit providers.

The manual guides counsellors and ensures a consistent, best practice approach for the delivery of trauma specialist counselling services.

Further, the not-for-profit panel providers will collaboratively develop orientation and training materials for all counsellors and employees.



Attachment A – Medibank’s Best Practice Manual (provided in confidence and not for public release)

## MEDIBANK – ANSWERS TO QUESTIONS ON NOTICE FROM THE INQUIRY INTO NATIONAL OUTCOME 4 OF THE NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN

### Question:

Ms McMahon: I'd suggest that some of our contractual arrangements with partners would be considered confidential, but certainly the arrangement going forward is quite different from the previous arrangement, in the fact that Medibank are now providing the clinical governance, the workforce planning, the IT infrastructure et cetera, and our specialist partners are providing specifically the trauma specialist counselling.

CHAIR: Yes, I know. What I'm interested in is: what are the KPIs that you've set for these specialist trauma counsellors? The reason I'm interested is that, whilst there are now a series of leaps, essentially we are talking about a service that was established as part of a national plan to address violence against women. People are spending public money to deliver a service, and I'm trying to understand what standard has been set for the quality of service that will be delivered. You've got a key role in administering and organising that. It may be commercial-in-confidence from your perspective, but I would submit there is a public interest in understanding a little more about what it is that you're trying to accomplish and how you've secured that in your contracting arrangements. In asking those questions, Dr Swan, I might just point out that I'm not proceeding from an assumption that it's inadequate. I simply think it ought to be transparent, and that is why I'm asking the question.

Ms McMahon: From our perspective moving forward, we're really ensuring that, from a workforce planning perspective, the calls are being answered. Our metric is really around fill rate and making sure that we have 96 per cent of the allocated shift hours completed across the partners, or ensuring that they have an adherence to the schedule. We are making sure that we understand the percentage of time each staff member is working, and there are certain competency standards that we are holding our partners to. I am happy to provide the committee with a copy of the KPIs.

CHAIR: That would be great. I think it is the competency standards that it would be most important for us to understand, and how they are articulated and expressed. Obviously, there are different ways that you could do that, but you say that there is a real interest in the manual and the clinical protocols that are in place. How that relates to the competency standards you have put in place in these contracts would be very important for the committee. So, if you are taking that on notice, and I think you are—

Ms McMahon: I will provide you with the specifics.

### Answer:

Medibank adopts a number of criteria or 'key performance indicators' to ensure high quality trauma specialist counselling.

#### *Competency Standards*

All trauma specialist counsellors are required to have a three year tertiary degree in a relevant field and a minimum of three years' experience specifically in specialised family and domestic violence and sexual assault counselling.

Specifically, all counsellors providing trauma specialist counselling services:

- Must be eligible for membership of the Australian Association of Social Workers (AASW), the Australian Psychological Society (APS) or the Counsellors and Psychotherapists Association of NSW (CAPA) by way of completion of a three year tertiary degree in a relevant field (such as social work, social services, welfare studies, psychology or counselling).

- Must have demonstrated a minimum of three years' (or full-time equivalent) experience in specialised family and domestic violence and sexual assault counselling and working with clients from diverse backgrounds and locations.
- If they do not have appropriate specialist family and domestic violence and sexual assault experience, counsellors must engage in a professional development plan with the relevant panel member to develop their specialist skill set as a family and domestic violence and sexual assault counsellor (provided they have at least three years' post-qualification (or full-time equivalent) counselling experience).

#### *Service Standards*

Members of the new panel arrangement for trauma specialist counselling are required to deliver high service standards:

- At least 96 per cent of allocated shift hours must be completed.
- The proportion of staff scheduled call handling time that is worked in accordance with the schedule for each shift must remain above 95 per cent, but there is no restriction or time limit on the amount of time counsellors can spend with individual callers.
- The percentage of staff time that is scheduled but not worked must not exceed four per cent.
- Counsellors must satisfy the competency standards noted above.
- Medibank must be informed of any failure to meet the service standards and, in this circumstance, the subcontractor must provide a remediation plan (with measures reasonably necessary to prevent reoccurrence of the failure) within three business days.

#### *No Restrictions on Service Time and Referrals*

Medibank places no restrictions or time limits on the amount of time counsellors can spend with individual callers.

Medibank places no restrictions on the number of calls that can be referred for trauma specialist counselling.

## **MEDIBANK – ANSWERS TO QUESTIONS ON NOTICE FROM THE INQUIRY INTO NATIONAL OUTCOME 4 OF THE NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN**

### **Question:**

Ms McMahon:...provide you with the specifics. From a competency perspective, it is very much the case that the trauma specialist counsellors are also highly qualified and have that three-year tertiary degree.

CHAIR: Do the competency standards go only to qualifications or do they go to other questions?

Ms McMahon: I will have to get you a copy and take that on notice.

### **Answer:**

Refer to previous question.

## **MEDIBANK – ANSWERS TO QUESTIONS ON NOTICE FROM THE INQUIRY INTO NATIONAL OUTCOME 4 OF THE NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN**

### **Question:**

Senator KAKOSCHKE-MOORE: Just going back to the RDVSA manual for a moment, on notice, could you provide the committee with the edition you said that you have? We've got the third edition here. How did you come to possess it? Was it as a result of a request by Medibank or was it offered? If it was as a result of a request by Medibank, what was the date the request was made and the date that you received the manual? I just want to get a better idea about how long you've had this for.

Ms McMahon: I'm not aware. I would assume that it would be something that would be worked through in conjunction with the first response counsellors.

Ms Cain: We'll take that on notice.

### **Answer:**

Medibank is aware of the 'Best Practice Manual for Specialised Sexual, Domestic Violence Counselling' produced by R&DVSA.

The third edition of the R&DVSA manual was published in February 2016 and is publicly available for purchase.

Medibank acquired a copy of the third edition of the R&DVSA manual in June 2016.

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### Question:

Senator RICE: How many of those first-response counsellors are in a call centre, working with peers, and how many are working from home?

Ms McMahon: I don't know the breakdown. There are some that work from home and sometimes in the call centre.

Senator RICE: Can you take that on notice?

### Answer:

There are approximately 58 staff working on 1800RESPECT as first response counsellors. All of these counsellors have a minimum three year tertiary degree in a field such as psychology or sociology and at least two years of counselling experience.

Of the 58 staff working on 1800RESPECT as first response counsellors, three work in an office, with the remainder working from home.

Staff working from home come into an office for training as required. Any support that staff require is provided and well monitored.

There are layers of robust support and engagement for our virtual teams, including:

- Access to secondary consultation with a clinical lead 24 hours, seven days a week.
- Access to instant communication tools to connect staff in real time.
- Monthly coaching with clinical leads.

Medibank has in place strict guidelines for counsellors working from home to ensure the confidentiality of client information and the security of data and I.T. systems, including:

- Ensuring arrangements for the safe storage of confidential material.
- Appropriate home security.
- Ensuring all business data is saved/backed up on the Medibank server, or an I.T.-approved medium if the data is too large to copy/save across the remote link.
- Ensuring that none of the business data is accessed and/or copied by any other person.

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### **Question:**

Senator KAKOSCHKE-MOORE: I think what it might be useful for the committee to understand is whether or not Medibank is making a profit from this particular aspect of your business.

Ms Cain: Sure. Medibank ensures accountable—

Senator KAKOSCHKE-MOORE: 1800RESPECT only—I'm not talking about any of the other health services.

Ms Cain: And I'm responding—happy to respond directly to that. Don't worry; I'm not going somewhere else. Medibank ensures accountable and transparent processes with the Department of Social Services. In line with our contract, Medibank supply the department with acquitted accounts on 30 November each year. These are independently audited before they're supplied to the department. These accounts detail how the funding was spent in the previous year. This includes a management fee allocation, which is profit before allocation of costs related to senior management oversight, those related to infrastructure and governance costs; MPL's intellectual property; return on invested capital; and accruals for redundancies should a fixed-term contract come to an end. Based on the most recently submitted financial accounts that have been acquitted to the department, which are the FY 2016 numbers, the management fee was \$950,000. Once the FY 2017 accounts are acquitted, finalised, audited and submitted to the department, Medibank would be most willing to supply these to the Senate inquiry.

Senator KAKOSCHKE-MOORE: How long will that take?

Ms Cain: They're not due till 30 November, so 1 December.

Senator KAKOSCHKE-MOORE: Okay.

### **Answer:**

Medibank will provide its acquitted accounts to the Department of Social Services on 30 November, which has been standard practice since the 1800RESPECT contract was awarded by the Australian Government in 2010.

Medibank notes the Inquiry into Delivery of National Outcome 4 of the National Plan to Reduce Violence Against Women and Their Children is scheduled to report on 27 November and, as such, Medibank will only be able to provide our acquitted accounts to the inquiry if its reporting date is extended.

## MEDIBANK – ANSWERS TO QUESTIONS ON NOTICE FROM THE INQUIRY INTO NATIONAL OUTCOME 4 OF THE NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN

### Question:

CHAIR: Is there a specific protocol around requests which may breach the privilege associated with support for sexual assault or other kinds of trauma? The issue is that there is a specific set of issues around this kind of information. You're saying you have a general legal protocol in place for the whole of your business—good. I'm asking for a specific legal protocol that you've put in place to make it clear to all staff in your legal team what the response will be if a request of this kind comes to the organisation.

Ms McMahon: I believe there is, but could I take that on notice. I'm happy to provide you with a statement to that effect....

CHAIR: Look, it may well be incorrect. You may be able to say here that it is or isn't your intention. In a very large organisation, what matters is whether or not you've established some clear operating principle that will govern the actions of individuals who practically make decisions on a daily basis about these questions. There is a default position in many women's organisations that they will object to all such subpoenas. Is that the position for your organisation?

Ms McMahon: We will object to a subpoena, certainly, but obviously we are subject to the laws and powers, as most people are.

CHAIR: The question is how much resource and time you're prepared to expend.

...

CHAIR: Ms McMahon, you've said you think you have a protocol in place to deal with this. Are you telling me that you have for certain or that you don't know?

...

CHAIR: No—please answer the question. I want to know: is there a protocol in place to deal with these issues internally?

...

CHAIR: But is there a written-down policy document?

Ms Cain: I'm not aware of whether there is a dedicated document to this. I would like to add, however, that it's not a generic team of lawyers that works across Medibank on all aspects. We have a dedicated team of lawyers specific to Medibank Health and a team within that team which is focused on services related to this area of the business, which 1800RESPECT falls within. I am extremely confident that there are appropriate measures in place to ensure that subpoenas are responded to appropriately and rejected should they need to be, based on risk based factors.

Ms McMahon: As I said previously, I'm happy to get that to you.

CHAIR: All right. If such a document exists, I think it would be helpful for the committee to see it.

### Answer:

Medibank's submission at page 12 details our response to subpoenas.

All requests for access to records held by Medibank are handled in accordance with Medibank's Privacy Access Procedure, a copy of which is attached as Attachment C. All records must be reviewed by the relevant Medical Advisor or Clinical Advisor before being released. In certain circumstances – including where the request is under subpoena or where Medibank proposes to refuse to provide records (for example, because of safety or privacy concerns) – the request is treated as 'high risk' and the Medical



Advisor or Clinical Advisor must engage with Medibank Health's legal team to determine the appropriate course of action. The legal team considers options available to resist production of records on a case-by-case basis, in consultation with the clinical team.

The legal team has an internal guidance note in place relating to the handling of subpoenas. This guidance note is at Attachment B and is equivalent to a 'protocol.' Relevantly, the guidance note calls out privilege (including client legal privilege and sexual assault communications privilege) as a ground which may be available to object to production of documents in certain cases. The legal team also has access to a document setting out the jurisdictional specifics for the sexual assault communications privilege, Attachment D.

Medibank is also aware of the 'Managing legal requests for client files, subpoenas, and third party requests for psychological reports' professional practice guidelines from the Australian Psychological Society. Medibank's legal team would also have recourse to these guidelines if we received a subpoena requiring the production of call records relating to the 1800RESPECT service.

Attachment B – Medibank’s Internal Guidance Note on Responding to Subpoenas

Attachment C – Privacy Access Procedure

Attachment D – Sexual Assault Communication Privilege Across Australian Jurisdictions

# Guidance Note (GN01)

## Responding to Subpoenas

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This Guidance Note discusses the key issues you should consider when responding to a subpoena. The Supreme Court of NSW rules concerning subpoenas were updated to the Uniform Civil Procedure Rules 2005 (NSW) in 2011, with the introduction of Practice Notes 18 and 19 in 2012.

### What is a Subpoena?

Subpoenas are commonly used in civil litigation matters and will typically be used as an order from a court, tribunal or similar body, requiring an individual, corporation or other entity, to produce a testimony, document or evidence by a specified date.

If you have received a subpoena, you have an obligation to produce the relevant documents or evidence specified within the subpoena to the court, tribunal or other issuing body. The subpoena will specify a date by which the relevant documents need to be produced, either by sending them to the court or tribunal, or by delivering them in person on or before the date specified.

### Initial steps when receiving a Subpoena

When a subpoena arrives it will usually arrive via internal mail to your desk, or reception will contact you to collect and sign for it. As soon as you have received the subpoena, you should take a number of preliminary steps to ensure a prompt and timely response:

☑ **Identify which area of business the subpoena is for**

A subpoena should contain:

- a. **Cover Page** – Listing the Plaintiff and any Defendants.
- b. **Court Approved Stamp** – This means the issuing court or tribunal has registered the Subpoena.
- c. **Schedule** – This section lists the documents which must be produced, and will indicate the business unit which should be responsible for responding to the subpoena, and whether you are able to respond to the request yourself.
- d. **Conduct Money** – This money is a payment for expenses incurred in complying with the subpoena. Conduct money will come either as Cheque or Cash. Conduct money should be forwarded to finance after we have responded to the subpoena.

CARE
A subpoena which requires production of employment records and payslips should be forwarded to the People & Culture Team.

☑ **Alert 'Need-to-Know' employees**

You should first alert employees who need to know that the company has been served with a subpoena. This may include the General Manager Legal (MHS), the Group General Counsel, other in-house lawyers, certain corporate officers and possibly outside lawyers.

☑ **Calendar Deadlines**

Once the subpoena has been served, you should **identify** and **diarise** in your calendar exactly when you must respond to the subpoena. You should also take care to make allowances for postage and public holidays. If necessary, you can contact the legal team who may be able to

negotiate an extension with the issuing party (particularly where we have been given only a very short time to comply). Any extensions should be agreed in writing.

☑ **Identify and preserve all relevant documents / evidence**

Once the subpoena has been served, you have a legal duty to **identify** and **preserve** the relevant documents and evidence. If the subpoena is addressed (served) on a Medibank Group company you should immediately take the following additional steps to ensure that all relevant documents are identified, collected and preserved.

1. Issue a written litigation hold notice requiring Need-to-Know employees to collect and preserve all potentially relevant documents;
2. Identify all potential custodians of the relevant documents including IT personnel and employees who may possess access to the relevant documents; and
3. Monitor employee document preservation and collection efforts to ensure they comply with the notice and the company's obligations.

**CARE**

If a Medibank Group company is served with a subpoena, it must produce all relevant documents within the control of companies within the Medibank Group (regardless of which Group company is named in the subpoena). If you believe relevant information may be held by other companies within the Medibank Group, you should take steps to alert the appropriate people to ensure they too take proper steps to identify and preserve the relevant documents.

The duty to preserve is triggered regardless of whether you believe the subpoena is objectionable. Ultimately, it is the court that determines the subpoena's validity. Please note that if you fail to take reasonable steps to preserve the relevant evidence, you may be held in contempt.

## Potential Responses to a Subpoena

You may respond to a subpoena in several ways. Depending on the individual circumstances of the case, you may:

- Contact the issuing party to clarify the scope or negotiate an extension (see '***Informally contacting the Issuing Party***');
- Contact an adverse party (that is, a party to the litigation who did not serve the subpoena) in an attempt to have that party exercise its rights against the party who issued the subpoena (see '***Informally Contacting the Adverse Party***').
- Comply with the subpoena and provide the requested testimony and/or documents (see '***Complying with the Subpoena***');;
- Contact the issuing party and/or serve Notice of Objection (see '***Notice of Objection***');;
- Make an application to the Registrar to set aside the subpoena (see '***Setting aside a subpoena***');; or
- Object to inspection (see '***Objection to Inspection***');;

## Informally Contacting the Issuing Party

An efficient and cost effective way to clarify and narrow the scope of a subpoena and its related costs is to contact the issuing party. This direct dialogue may also lead to additional time being granted in

which to respond to the subpoena, as well as giving you a better understanding of what is being sought and the information which will be contained within the responding documents.

## Informally Contacting the Adverse Party

Before responding to the subpoena, you may wish to contact the other party to the underlying lawsuit (i.e. the party that is adverse to the issuing party). The adverse party may independently decide to lodge a Notice of Objection, an Application to Set Aside or an Objection to Inspection of the documents requested under the subpoena, where the adverse party has a personal right or privilege that is affected by information relevant to the subpoena.

## Complying with the Subpoena

If you decide to comply with the subpoena, you must ensure you produce all material documents and evidence which are in your possession, custody or control. You will also need to ensure that any relevant material held by other companies within the Medibank Group is produced.

When producing documents, do not produce original hard copies unless requested by the order; photocopies will suffice. If the volume of documents is large, scanning and issuing electronic soft copies onto a DVD is acceptable. If the documents (including emails) are stored electronically, they should only be produced by means of PDF format, to prevent tampering or interference.

### CARE - Method and Timing of Service

You must deliver the documents to the **court or tribunal** on the **specified date, time and location** as stated within the subpoena. You should also ensure you make allowances for postage and public holidays. After delivery of the documents, you may also need to **prepare an affidavit of service**, setting out:

- ☒ The identity of the individual who delivered (posted) the documents
- ☒ A general description of the documents delivered;
- ☒ The method, time, date and place of delivery; and
- ☒ Any other relevant details.

**DO NOT DELIVER DOCUMENTS DIRECTLY TO THE ISSUING PARTY.**

## Notice of Objection

If you wish to object, or are uncertain about the documents required by the subpoena, you should first contact the issuing party and flag your concerns. The issuing party will usually agree to amend the scope of the subpoena by providing further details to the documents, or alternatively, agree to withdraw the subpoena or arrange to have a new subpoena issued which does not have the same problems.

There are a number of reasons you may wish to object to the subpoena, including:

- Insufficient time to comply;
- Seeks irrelevant evidence;
- Requires disclosure of privileged or other protected / sensitive information;
- Subjects the recipient to undue burden or expense;
- Requires the disclosure of trade secrets or commercially sensitive information;
- Requires disclosure of an un-retained experts opinion or information;

- Contains requests that are too vague and ambiguous that it is unreasonable or impossible to comply;
- Was improperly served;
- Was issued out of the wrong jurisdiction / court.

If you believe you are able to make out one of the grounds for objection above, and the issuing party has failed to deal with your concerns, you can formally object by completing, filing and serving a Notice of Objection to the issuing party. The objection must be made in writing using the form attached to the original subpoena. It must include the grounds for objection and should be supported by completing an affidavit. You should also be able to download a copy of the template Notice of Objection form from the website for the relevant court or tribunal (for example, see the Federal Magistrates Court of Australia website <http://www.fmc.gov.au/forms/html/subpoena.html>).

You must issue any Notice of Objection to the Issuing party and the court or tribunal before the date specified within the subpoena. You will then be required to attend the court or a tribunal on a date set by the Registrar for consideration and determination of this Objection.

### Setting aside a Subpoena

The first step which should be taken if you cannot comply with a subpoena (or if you consider the request to be unreasonable) is to contact the issuing party and seek to have it withdrawn. However, if these negotiations fail, you can apply to the Registrar to set the subpoena aside on a number of grounds, including that the subpoena:

- Was issued for an illegitimate forensic purposes;
- calls for too many documents or imposes too unreasonable a burden on you in proportion to the potential relevance of the documents (is "oppressive").
- constitutes "fishing" (ie. is more directed at finding documents to see if the issuing party has a case than finding documents relevant to its case);
- is drafted with insufficient particularity in describing the documents; or
- is trying to be a substitute for discovery.

In order to set aside a subpoena, you are required to file and serve on the issuing party a Notice of Objection with a supporting affidavit which adduces evidence supporting one or more of the above grounds and then to appear before the Registrar at the return of the subpoena.

### Illegitimate Forensic Purposes

In some cases, a party may try to use a subpoena for an illegitimate forensic purpose, eg. as a substitute for discovery or application for further discovery, and/or for the purpose of discovering if the issuing party has a case at all (i.e. seeking evidence which is directly relevant to their case).

The court will need to determine the issuing party's motive for issuing the subpoena. The issuing party may find itself in a position of having to justify the breadth of the documents requested and explain their relevance during a hearing of an application to set aside.

### Oppressive

Claims of **oppressiveness** generally arise if the breadth of documents requested is so broad so as to seriously burden or prejudice the recipient. It could also arise if the description of the documents is too ambiguous that you cannot form a judgment about what documents would fall within the scope of the subpoena. In such a case, it would be prudent to contact or write to the issuing party to find out exactly what is being sought.

In determining an application to set aside a subpoena based on oppressiveness, the court will seek to balance the burden imposed on the recipient in producing the requested documents based upon the

time and cost involved in complying with the subpoena, and the public interest. In some cases, a court may consider it appropriate to set aside part of a subpoena to remove the oppressive effect that compliance with the whole of the subpoena may have on the recipient.

It should also be noted that, if cost and expense is an issue in complying with a subpoena to produce, there is generally a mechanism for the issuing party to meet “reasonable loss or expense incurred” by the recipient in complying with the subpoena.

### **Fishing**

This will occur if the purpose of the subpoena is to “fish for information” which may be relevant to the issuing party’s case. The breadth of the subpoena will be a relevant consideration, and the main question the court will ask is whether the requested documents have any relevance to the proceeding.

#### **The Court’s Decision**

If a court concludes that one or any of the grounds for the application to set aside are made out, the court will generally make an order that the subpoena constitutes an abuse of process and it will be set aside. If, however, a court does not grant an application to set aside a subpoena, you will need to comply with the subpoena by producing the requested documents to the court.

**Please note that production to a court does not automatically mean the parties can gain access to the documents. The court will still need to make a decision as to whether to allow the parties to inspect the documents. In this context, it is relevant to consider whether any objections to inspection should be made.**

### **Objection to Inspection**

Anyone who has a “sufficient interest” in the information requested in the subpoena may generally object to a document being inspected by a/any party to the proceeding. These objections must be made in writing to the Registrar and must include the grounds of the objection.

Upon receiving the objection, the Registrar must not permit any further inspection of the relevant document and must refer the objection to the court for hearing and determination. This objection must be made by means of application and should be supported by an affidavit which will set out the ground(s) of objection.

It is generally good practice to make the Notice of Objection at the same time as producing the documents, which will ensure that none of the parties are permitted to gain access to the documents before the objection is heard and determined by the Court.

The two most common grounds which are relied upon in objecting to inspection are that client legal privilege or public interest immunity attach to documents which have been produced.

#### **Client legal privilege**

Objection to inspection on the basis that a document is subject to client legal privilege rests on an argument that the document contains a confidential communication between a client and lawyer for the dominant purpose of a lawyer providing legal advice to the client and/or for the dominant purpose of the client being provided with professional legal services relating to a proceeding.

#### **Sexual assault communications privilege**

Objection to inspection on the basis that a document or recording is subject to sexual assault communications privilege rests on an argument that the document contains a confidential

communication between a client and a counsellor (or, in some cases, between two counsellors who have both counselled the client). As with client legal privilege, the rules vary slightly between jurisdictions.

### Public interest immunity

A claim that a document attracts public interest immunity may arise when a government agency is the recipient of a subpoena which requests documents that relate to matters of state, and the disclosure of those documents could injure the public interest. Such documents may include cabinet minutes, minutes of discussions between departmental heads, papers brought into existence for the purpose of preparing a submission to cabinet, documents which relate to the framing of government policy at a high level, documents which if disclosed would prejudice Australia's security or prejudice the investigation or prosecution of an offence. In this regard, the main question is whether inspection of the documents is outweighed by the public interest in preserving its secrecy/confidentiality.

#### Possible Court Orders

The court has discretion to issue an order to protect a party from embarrassment, oppression, undue burden or expense, by taking one or more of the following actions:

- Forbidding the disclosure or discovery;
- Specifying terms, including time and place for the disclosure;
- Prescribing the discovery method (i.e inspection)
- Forbidding inquiry into certain matters or limiting the scope of disclosure to certain matters;
- Designating the persons who may be present while inspecting;
- Requiring a trade secret or other confidential research development or commercial information not to be revealed;
- Requiring that parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

If you wish to apply for court orders, you must do so before the subpoena's return date.

### Consequences for failing to comply with the Subpoena

If you fail to comply with an otherwise valid subpoena without reasonable excuse, you will be held in contempt and may be subjected to fines or even imprisonment. Reasonable excuse is a question of fact within each case.

### Frequently Asked Questions (FAQs)

Does the recipient of a subpoena need to comply?



The short answer is "yes". A subpoena to produce documents is an order issued by the Supreme Court of NSW. Failure to comply with a validly issued subpoena, unless lawfully excused, constitutes contempt of court.

#### **What do I need to produce?**

The subpoena will specify the relevant documents you must produce. If the request contained in the subpoena is very broad or vague, you have the right to apply to the Supreme Court to have it set aside (see below).

Documents can be produced either by posting them to the Registrar of the Supreme Court **two clear days** before the return date or by attending the return of the subpoena in person at the Supreme Court. **The documents produced in answer to the subpoena should not be sent directly to the issuing party.**

When you send the documents to the Registrar of the Supreme Court, ensure that they are accompanied by a copy of the subpoena with the section entitled "Declaration by Subpoena Recipient" duly completed. This involves setting out whether the documents are originals or copies and whether you wish them to be returned to you at the completion of the proceedings. Please note if you do not request the return of the documents in the declaration, then Practice Note 18 states that the Supreme Court will destroy the documents.

#### **It is permissible to produce electronic or soft copies of documents?**

The Issuing parties can specify on the subpoena whether electronic copies of documents can be produced instead of hard copies. Practice Note 18 states that these documents can be provided on a DVD, a CD or a USB device or can be emailed to the registry at [supreme\\_court@courts.nsw.gov.au](mailto:supreme_court@courts.nsw.gov.au).

#### **How much time do I have to comply with the subpoena?**

The date by which documents must be provided to the Registrar (the return date) is specified in the subpoena. This period of time can be as short as five business days from the date you are served with the subpoena.

If you need more time to comply or have any other concerns about size or nature of the request, you should contact the issuing party (or their lawyers) and negotiate a revised date within which to comply. However, if no agreement is reached then you must attend the return of subpoena and make submissions to the Registrar as to why you should be given an extension of time.

#### **I have received a request for information without a subpoena?**

A document or other information may be sought without a subpoena, by means of a letter or oral request from a law enforcement agency such as the police force or a statutory body, such as the ATO or the Victorian Work Cover Authority.

In such a case, care must be taken to ensure that personal information and health information is only disclosed in accordance with the Information Privacy Principles in the Information Privacy Act and the Health Privacy Principles in the Health Records Act.

The body or its representative requesting the information should also state what statutory power is being relied upon in requesting the information.

#### **I have been asked to give a verbal witness / expert testimony**

If you agree to comply with the request, you will need to ensure you attend on the specified date, time and location of the deposition or trial. If the subpoena was to request a company officer, director or managing agent, the company should ensure that the appropriate witness has the requisite knowledge about the topic stated in the subpoena and appears to testify.

For high-level executives, the company will usually hire a lawyer to attend and represent the witness. For all other employees the company should only appoint a lawyer if their testimony has the potential to affect the rights or interests of the company. In addition the requesting party should arrange for the requesting party to reimburse the witness for all reasonable expenses incurred.

**CARE - The witness should not review any 'privileged' documents, as this could risk waiving the privilege over those documents.**

**I have been asked to appear in court to make a witness / expert evidence statement, and I am unable to attend?**

If the subpoena requires a testimony or witness statement from a company representative, the proper witness should be identified and notified. If the company representative is unable to attend the company must indicate this fact as part of a written response to the subpoena, or negotiate a mutually convenient appearance date.

**I want to comply with the subpoena, but I don't have any documents relating to it?**

If you conclude that you or a corporate affiliate, do not possess any of the relevant documents or evidence, you are still required to respond to the issuing party in writing setting forth that fact. Please note your response must be served no later than the return date noted on the subpoena, or as otherwise agreed.

**Do confidential or privileged documents have to be produced?**

Some documents that fall within the scope of a subpoena may be "commercially sensitive" and thus "confidential". A common solution to concerns you may have regarding confidentiality is for the Registrar to require the inspecting parties to sign a confidentiality undertaking.

Communications between a lawyer and a client are also subject to "legal professional privilege" and you should be aware that this privilege may be waived by producing documents under subpoena. You are still obliged to produce these privileged documents to the Court, but they should be placed in an envelope labelled "Subject to confidentiality/legal professional privilege".

Documents that are subject to legal professional privilege cannot be inspected unless by a further order of the Supreme Court. If a claim for legal professional privilege is made over certain documents you must appear before the Registrar on the return date, file an affidavit in support, and make submissions as to why the documents are subject to legal professional privilege.

**What happens if I mistakenly release privileged or protected information?**

If information is mistakenly issued in response to the subpoena, you should immediately write to notify the parties of this fact. The receiving party should then:

- Promptly return, or destroy the documents and any copies it has;
- Agree not to disclose the information until the claim is resolved;
- Take reasonable steps to retrieve the information if the party has disclosed it to other parties (i.e. solicitors) before being notified of the mistake.

**Can I claim back my expenses?**

The reasonable costs associated with your compliance (including the cost of legal advice sought in relation to compliance) are recoverable to a certain degree, including any photocopying costs. The first step however, should be to attempt to reach an agreement with the issuing party as to your "reasonable costs". If you cannot agree on an amount, Practice Note 19 states that on the return date you can apply to the Court for an order for your costs of production.

Ordinarily the question of expenses will be determined after compliance with the subpoena – unless there is evidence establishing a genuine doubt about the ability of the issuing party to meet any order for expenses.

**Grounds for setting aside a subpoena**

The first step which should be taken if you cannot comply with a subpoena or consider the request to be unreasonable is to contact the issuing party and seek to have it withdrawn. However, if these negotiations fail, you can apply to the Registrar to set aside a subpoena on a number of grounds, including that the subpoena:

- was not issued for a legitimate forensic purpose;
- constitutes "fishing" (ie. is more directed at finding documents to see if the issuing party has a case than finding documents relevant to its case);
- is drafted with insufficient particularity in describing the documents;
- is trying to be a substitute for discovery; or
- calls for too many documents or imposes too unreasonable a burden on you in proportion to the potential relevance of the documents.

In order to set aside a subpoena, you are required to file and serve on the issuing party a notice of motion and supporting affidavit which adduces evidence supporting one or more of the above grounds and then to appear before the Registrar at the return of the subpoena.

## **Privacy – Request to Access Information Procedure Medibank Health Solutions**

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# Privacy Access Procedure

## 1.1 Purpose and Scope

This document describes the process staff must follow when a call or written request is received to access information held by Medibank Health Solutions. The process applies to requests by or on behalf of a client/patient or by a third party (such as the police or a lawyer representing the client/patient). It also covers requests from lawyers and courts for MHS staff to attend court.

## 1.2 Legislation Requirements

This document addresses the information gathering, approval, release, payment and record requirements including any necessary interactions with key clients such as Healthdirect Australia. It also addresses the information access and correction requirements of APP12 the Australian *Privacy Act 1988 (Cth)* in relation to personal information held by Medibank Health Solutions. It also attends to the access and correction requirements of the *Health Records Act 2001 (VIC)* in Victoria, *Health Records (Privacy and Access) Act 1997 (ACT)* in the Australian Capital Territory and the *Health Records and Information Privacy Act 2002 (NSW)* in New South Wales in relation to health records held by Medibank Health Solutions.

NOTE: Medibank Health Solutions is not directly required to respond to requests for information under the *Freedom of Information Act 1982 (Cth)*. There should be no reference to Freedom of Information in any documentation provided to clients.

## 1.3 Reasons why MHS may not give access to records

**Review Requests** - On request by the individual, MHS is to give the individual access to the information, **unless one of the following applies:**

- **Serious Threat** - Medibank believes that giving access would pose a serious threat to the life, health or safety of any individual, or of the public; or
- **Privacy of others** - giving access would have an unreasonable impact on the privacy of other individuals; or
- **Frivolous requests** - the request for access is frivolous or vexatious; or
- **Legal proceedings** - the information relates to existing or anticipated legal proceedings between Medibank and the individual; or
- **Prejudicial to negotiations** - giving access would prejudicially reveal the intentions of Medibank in relation to negotiations with the individual; or
- **Unlawful** - giving access would be unlawful; or
- **Denial authorised by law** - denying access is required or authorised by or under an Australian law or a court/tribunal order; or
- **Unlawful Activity** - Medibank suspects unlawful activity, or serious misconduct of a serious nature and giving access would prejudice appropriate action; or
- **Enforcement activities** - giving access would be likely to prejudice one or more enforcement related activities by an enforcement body; or
- **Commercially sensitive decisions** - giving access would reveal evaluative information in connection with Medibank's commercially sensitive decision; or
- **Information given in confidence** - giving access to a health record would reveal information given in confidence by a person other than the individual, their guardian or health service provider. (Source: Health Records (Privacy and Access) Act 1997 (ACT), Health Records Act 2001 (VIC))

## 2. Request to Access Information Procedure - Process

ID	Description	Reference - Document	Responsibility
2.1	<p><b>Request for records from Caller/Patient</b></p> <p>It is the responsibility of all staff to understand the requirements they must undertake when asked by a patient/caller for a copy of their records. All requests must be in writing and address the following criteria:</p> <ul style="list-style-type: none"><li>• Name</li><li>• Date of Birth</li><li>• Address</li><li>• Telephone number</li><li>• MHS business unit or service to which the request relates</li><li>• Reason for request</li><li>• Previous residential address (if address in the case notes differs from current address)</li><li>• Name of the person whose records they wish to access</li></ul>	<p><a href="#">Request to Access Information- Notification Form</a></p> <p><a href="#">Request to Access Information Form</a></p>	All Staff

2.2	<p><b>Advise the person making the requests that:</b></p> <ul style="list-style-type: none"> <li>Requests must be made in writing and mailed / emailed to:  Privacy Team  Medibank Health Solutions  PO Box 712, Osborne Park BC, WA, 6196  Email: <a href="mailto:Privacy--MHS@medibank.com.au">Privacy--MHS@medibank.com.au</a></li> <li>Requests must be accompanied by certified photo identification, witnessed and signed by an Authorised Witness. Please see the Request to Access Information Form for a list of Authorised Witnesses.</li> </ul> <p><b>Fees</b></p> <p>There is no fee for making an information access request. However, in some circumstances, an administration fee may be payable for the provision of some information. The administration fee:</p> <ul style="list-style-type: none"> <li>applies where the production of the information requested is unduly onerous, and</li> <li>is charged on a cost recovery basis only, and</li> <li>may be waived at the discretion of the clinical director or privacy team on a case by case basis, having regard to the financial and personal circumstances of the requestor.</li> </ul> <p>Where a request for information will attract the administration fee, the person making the request should be:</p> <ul style="list-style-type: none"> <li>advised of the administration fee, and</li> <li>asked if they wish to proceed with their full request, or if they wish to amend it so as to reduce or eliminate the fee,</li> </ul> <p>before the work to produce the records requested is undertaken and the administration fee is applied.</p> <p><i>NOTE: All requests must be actioned as soon as possible to ensure Medibank Health Solutions can respond to the request within <b>14 days</b> and provide access within <b>30 days</b> from the date of the original request, if approved.</i></p>	<p><a href="#">Request to Access Information– Notification Form</a></p> <p><a href="#">Privacy Access Requests – Costs &amp; Fees Review</a></p>	<p>All Staff</p> <p>Privacy Team/ Head of Privacy / Legal</p>
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2.3	<p><b>Request for records from the Police</b></p> <p>If a police officer contacts a business unit and requests for the release of records:</p> <ol style="list-style-type: none"> <li>1. Complete and submit the Police Request for Information web form. The details of this form will be provided to the Privacy Team who will contact the Police Officer to discuss their request.</li> <li>2. Advise the requesting Police Officer <i>"The Medibank Health Solutions Privacy Team will contact you as a priority during business hours to discuss your request"</i></li> </ol> <p>When notification of the Police request is received:</p> <ol style="list-style-type: none"> <li>1. Call (if the Officer is unavailable then email) the Police Officer as early as possible within business hours.</li> <li>2. Determine if the request for information relates to a Healthdirect Australia contract.</li> </ol> <p><b>Police Requests: Healthdirect Australia contract</b></p> <ol style="list-style-type: none"> <li>1. Advise the Police Officer to send their request for information to Healthdirect Australia Clinical Governance and Maureen Robinson: <ul style="list-style-type: none"> <li>• <a href="mailto:clinical.governance@healthdirect.org.au">clinical.governance@healthdirect.org.au</a></li> <li>• <a href="mailto:Maureen.robinson@healthdirect.org.au">Maureen.robinson@healthdirect.org.au</a></li> </ul> </li> <li>2. Within one business day of receiving the notification, advise the Relationship Manager that a Police Request has been redirected to Healthdirect Australia.</li> </ol> <p><b>Police Requests - All other contracts:</b></p> <ol style="list-style-type: none"> <li>1. Advise the Police Officer that Medibank Health Solutions requires a Police - Request for Release of Information Form to be completed.</li> <li>2. Obtain the Police Officer's email address and email the Police Officer a copy of the Police - Request for Release of Information Form.</li> <li>3. Advise the Officer to return the completed form to <a href="mailto:Privacy--MHS@medibank.com.au">Privacy--MHS@medibank.com.au</a></li> <li>4. Determine if there has been an incident of concern, of which Medibank Health Solutions should be aware. Consult the Medical Advisor where required.</li> <li>5. If the request is a result of a complaint or incident, submit a complaints and incident (CCIM) form detailing available information.</li> <li>6. Notify the Medical Advisor of the request.</li> </ol> <p><b>CIM and Insurance notification</b></p> <p><i>NOTE: You must log a <b>CIM Form</b> when the Police report an unexpected death or a suicide.</i></p> <p>When notified by Privacy Team, complete an Insurance Notification if applicable.</p>	<p>Privacy - Police Request for Information web form</p>	<p>All Staff</p> <p>Privacy Team</p> <p>Medical Advisor</p>
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[illegible]

[illegible]

2.7	<p><b>Statutory Declarations</b></p> <p>Through the course of their employment, an employee may be required to provide, or may be requested to witness, a statutory declaration.</p> <p>A statutory declaration is a written statement that a person signs and declares to be true and correct before an authorised witness.</p> <p>By signing the Statutory Declaration, the staff member agrees that the information in the document is true, and the staff member can be charged with perjury if the information is incorrect.</p> <p>It must contain an acknowledgement that it is true and correct and is made in the belief that the staff member making a false declaration is liable to the penalties of perjury.</p>	<p><a href="#">Statutory Declaration Fact Sheet Access to Information Form &amp; Authorised Witness List.</a></p>	<p>Staff Member / Privacy Team</p>
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### 3. Process to Review and Approve the Release of Medical Records

ID	Description	Reference Document	Responsibility
3	<p><b>Process to Review and Approve the Release of Medical Records</b></p> <p>On receipt of a Request to Access Information Form:</p> <ol style="list-style-type: none"> <li>1. Log request details the MHS Privacy Request Tracking sheet on V: drive. Liaise with relevant Team Leader /Manager to have records copied and sent by email to <a href="mailto:Privacy--MHS@medibank.com.au">Privacy--MHS@medibank.com.au</a>.</li> <li>2. Check all documents for patient/examinee ID prior to sending documents.</li> <li>3. Print medical records and/or encounter documents approved for release.</li> <li>4. When printing personal records use the Locked Print Job option or an isolated printer.</li> <li>5. De-identify staff on all records for general public requests.</li> <li>6. Make any changes requested by Medical Advisor, Clinical Advisor or Legal.</li> <li>7. Use standard template located in V: Drive to prepare covering letter. Print all requests on MHS letterhead.</li> <li>8. Complete receipt and accounts receivable template and forward it and any monies received to finance for banking.</li> <li>9. All requests for records are post “<b>Registered Post</b>” ONLY.</li> </ol> <p><i>NOTE 1: Police receive a disk with call recordings and encounter documents.</i></p> <p><i>NOTE 2: Call recordings never released except to police and the courts</i></p> <p><b>NOTE 3: If advice is required, Privacy Team to contact the Head of Privacy – <a href="mailto:privacy@medibank.com.au">privacy@medibank.com.au</a>)</b></p> <p><i>Medibank Health Solutions will respond to the request within 14 days and will provide access within 30 days from the date of the original request if approved.</i></p>		Privacy Team
3.1	<p><b>Medical or Clinical Advisor - Review of Records</b></p> <p>The Privacy Team will send the records to the relevant Medical or Clinical Advisor for a clinical review.</p> <p><b>Note:</b> The records cannot be released without the permission of the relevant Medical or Medical Advisor and the Relationship Manager.</p> <p>Email outcome to <a href="mailto:Privacy--MHS@medibank.com.au">Privacy--MHS@medibank.com.au</a> clearly indicating any requested changes or records not to be released.</p>		Medical Advisor

3.2	<p><b>Legal – Review of Records</b></p> <p>The Medical or Clinical Advisor will engage with the Legal team in relation to any High Risk Request.</p> <p>A High Risk Request for the purposes of this procedure is a request to access call records or health records held by MHS in any one or more of the following circumstances:</p> <ol style="list-style-type: none"> <li>1. where MHS proposes to refuse to provide the records in accordance with privacy or health records legislation;</li> <li>2. where the request relates to a complaint or clinical incident (including a clinical complaint, near miss or adverse incident);</li> <li>3. where the request is for a statement or evidence beyond the call records or health records;</li> <li>4. the request relates to a matter that has come to the attention of the media, or could reasonably be expected to come to the attention of the media, and/or adversely affect the reputation of Medibank, MHS or MHS' client;</li> <li>5. the request is under subpoena (criminal or civil), is from a Government agency, a solicitor, a coroner or federal, state or territory police;</li> <li>6. the request is under federal, state or territory freedom of information legislation; or</li> <li>7. the request is from a stakeholder within the health industry (for example, a patient advocacy group, peak body, health organisation, hospital, GP clinic or ambulance service).</li> </ol> <p><b>Note:</b> the Legal team will consider options available to resist production of records on a case by case basis, and will advise the Privacy Team and the Medical/Clinical Advisor accordingly.</p>		Legal team
3.3	<p><b>Relationship Manager - Review of Records</b></p> <p>Email outcome to <a href="mailto:Privacy--MHS@medibank.com.au">Privacy--MHS@medibank.com.au</a> clearly indicating any requested changes or records not to be released.</p> <p>Where necessary the RM will notify the Client of written privacy request and if applicable seek permission to release the information.</p>		Relationship Manager

3.4	<p><b>Healthdirect Australia Client</b></p> <p>All requests for records for Healthdirect Australia are to be reviewed and assessed to determine whether the request is a High Risk or a Non-High Risk Request (see High Risk Criteria below).</p> <p><b>High Risk</b></p> <ul style="list-style-type: none"> <li>• The Relationship Manager must notify Healthdirect Australia Ltd in writing at least 48 hours prior to any correspondence or interaction with the requestor relating to the decision to release the records or not.</li> <li>• The Relationship Manager/Privacy Team completes the release of records process.</li> <li>• All correspondence must be on the Medibank Health Solutions letterhead.</li> <li>• The Relationship Manager sends email confirmation of process completion to the Clinical Governance team at Healthdirect Australia Ltd.</li> </ul> <p><b>Non-High Risk</b></p> <ul style="list-style-type: none"> <li>• The Relationship Manager/Privacy Team completes the record request process.</li> <li>• All correspondence must be on the Medibank Health Solutions letterhead.</li> <li>• The Relationship Manager sends an email confirmation of process completion to the Clinical Governance team at Healthdirect Australia Ltd.</li> </ul> <p><b>High Risk Criteria</b></p> <p>A High Risk Request for the purposes of this procedure is a request to access call records or health records held by the Service Provider in any one or more of the following circumstances:</p> <ul style="list-style-type: none"> <li>• Where the Service Provider proposes to refuse to provide the records in accordance with privacy or health records legislation.</li> <li>• Where the request relates to a complaint or clinical incident (including a clinical complaint, near miss or adverse incident).</li> <li>• The request is for a statement or evidence beyond the call records or health records.</li> <li>• The request relates to a matter that has come to the attention of the media, or could reasonably be expected to come to the attention of the media, and/or adversely affect the reputation of Healthdirect Australia.</li> <li>• The request is under subpoena (criminal or civil), is from a Government agency, a solicitor, a coroner or federal, state or territory police.</li> <li>• The request is under federal, state or territory freedom of information legislation.</li> </ul>	<p><a href="#">Request to Access Information– Notification Form</a></p> <p><a href="#">Request to Access Information Form</a></p>	<p>Relationship Manager</p>
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#### 4. Requests for staff to complete a statement or to attend court

ID	Description	Reference Document	Responsibility
4.0	<b>Requests for staff to complete a statement or to attend court</b> <ul style="list-style-type: none"> <li><b>Police Statement:</b> The police may request a staff member to complete a Witness statement when they have been involved with a case that is going to court. Refer to the MHS Witness Statement Template.</li> <li><b>Court:</b> When staff receive notification they are required for a court case, they scan and email to notification to the Privacy Coordinator at <a href="mailto:Privacy--MHS@medibank.com.au">Privacy--MHS@medibank.com.au</a></li> <li>The Privacy Team will obtain the relevant case notes and forward to Legal, if required.</li> <li>The Privacy Team will forward the records and the guidance tool to the staff member to review prior to the court date.</li> <li>The Privacy Team will liaise with Legal to determine if the Request for staff to attend court letter is to be used.</li> <li>The Legal / Management Representative will meet with the staff member to provide support prior to the court case, if required.</li> </ul>	<a href="#">Request for Staff to Attend Court Letter (AUS)</a>  <a href="#">Giving Expert Evidence in Civil and Criminal Proceedings</a>  <a href="#">Witness Statement Template</a>	Privacy Team

#### 5. Unusual Requests

ID	Description	Reference Document	Responsibility
5.1	<b>Unusual privacy issues or specific problems:</b> refer the issue to the Privacy Team: <a href="mailto:Privacy--MHS@medibank.com.au">Privacy--MHS@medibank.com.au</a>	<a href="#">Request to Access Information Form</a>	
5.2	<b>Requests made under the Commonwealth Freedom of Information Act</b> must be referred to the Privacy Team: <a href="mailto:Privacy--MHS@medibank.com.au">Privacy--MHS@medibank.com.au</a>		
5.3	<b>Requests for records of deceased persons</b>  The Privacy Act 1988 (Cth) only applies to the living person and does not address the situation of the deceased patient's medical records.  It is reasonable to give access to the medical records of the deceased patient to the named executor of the estate of the deceased person.  NOTE: The executor could apply for a copy of the records on behalf of the individual.		

**Flowchart**

[Privacy – Access to Information Flowchart](#)



**SUMMARY OF SEXUAL ASSAULT COMMUNICATIONS PRIVILEGE IN AUSTRALIAN JURISDICTIONS (16 June 2016)**

	CTH	ACT	QLD	NSW	NT	SA	TAS	VIC	WA
<b>Criminal – Preliminary Proceedings (eg. committal, bail)</b>	No specific provision	<b>Yes</b> <i>Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 57</i> <ul style="list-style-type: none"> <li>A person cannot be required to produce a document recording a “protected confidence”</li> </ul> <u>Definitions: s 54 and 55</u> <ul style="list-style-type: none"> <li>Must be made by, to or about an (alleged) victim of a sexual offence to a counsellor</li> <li>Includes communication before offence allegedly occurred</li> <li>Applies even if the counselling is not made in connection with an alleged sexual assault</li> </ul>	No specific provision	<b>Yes</b> <i>Criminal Procedure Act 1986 (NSW) s 297</i> <ul style="list-style-type: none"> <li>Cannot compel or seek to compel using a subpoena (or other procedure) a person to produce a “protected confidence”</li> </ul> <u>Definitions: s 296</u> <ul style="list-style-type: none"> <li>Must be made by, to or about an (alleged) victim of a sexual assault offence to a counsellor</li> <li>Includes communication before offence allegedly occurred</li> <li>Applies even if the counselling is not made in connection</li> </ul>	<b>Yes</b> <i>Evidence Act s 56B</i> <ul style="list-style-type: none"> <li>“Confidential Communication” not subject to discovery, pre-hearing or pre-trial disclosure or inspection, not admissible in committal proceedings</li> </ul> <u>Definitions: s 56A</u> <ul style="list-style-type: none"> <li>Must be made by, to or about a victim of a sexual assault offence to a counsellor</li> <li>Includes communication before offence allegedly occurred</li> <li>Applies even if the counselling is not made in connection with an alleged sexual assault</li> </ul>	<b>Yes</b> <i>Evidence Act 1929 (SA) s 67E and s67F</i> <ul style="list-style-type: none"> <li>Communication relating to (alleged) victim of a sexual offence, if made in a ‘therapeutic context’ is protected by public interest immunity.</li> <li>Immunity cannot be waived by counsellor, party to the communication or (alleged) victim</li> <li>Entirely inadmissible in committal proceedings</li> </ul> <u>Definitions: s 67D and s67E</u> <ul style="list-style-type: none"> <li>“Therapeutic context” is defined as a communication made to enable a</li> </ul>	<b>Yes</b> <i>Evidence Act 2001 s 127B(3)</i> <ul style="list-style-type: none"> <li>Communication must not be adduced or admitted in any criminal proceedings unless victim has consented.</li> </ul> <u>Definitions: s 127B(1)</u> <ul style="list-style-type: none"> <li>Communication made between a victim of sexual offence and a counsellor in the course of counselling</li> <li>Includes communication made <i>in relation</i> to that victim for the purposes of counselling</li> <li>Counselling communication must not be disclosed in any criminal</li> </ul>	<b>Yes</b> <i>Evidence (Miscellaneous Provisions) Act 1958 (VIC) s 32C</i> <ul style="list-style-type: none"> <li>Cannot compel or seek to compel using a subpoena (or other procedure) a person to produce a “confidential communication” <u>unless the court grants leave</u></li> </ul> <u>Definitions: s 32B</u> <ul style="list-style-type: none"> <li>Must be made by, to or about an (alleged) victim of a sexual assault offence to a counsellor</li> <li>Includes communication before offence allegedly occurred</li> <li>Counsellor may with the</li> </ul>	<b>Yes</b> <i>Evidence Act 1906 (WA) s 19C</i> <ul style="list-style-type: none"> <li>A person cannot be required to produce a document recording a “protected communication” <u>without leave of the court</u></li> </ul> <u>Definitions: s 19A</u> <ul style="list-style-type: none"> <li>Must be made by, to or about a complainant to a counsellor</li> <li>Includes communication before offence allegedly occurred</li> <li>Applies even if the counselling is not made in connection with an alleged sexual assault offence</li> </ul>

	CTH	ACT	QLD	NSW	NT	SA	TAS	VIC	WA
		offence <ul style="list-style-type: none"> <li>• Presence of third party support person does not negate privilege if the presence was to assist the counselling process</li> <li>• Includes counsellor-counsellor communications if both have counselled that person</li> </ul>		with an alleged sexual assault offence <ul style="list-style-type: none"> <li>• Presence of third party support person does not negate privilege</li> <li>• Includes counsellor-counsellor communications if both have counselled that person</li> </ul>	offence <ul style="list-style-type: none"> <li>• Presence of third party support person does not negate privilege</li> <li>• Includes counsellor-counsellor communications if both have counselled that person</li> </ul>	counsellor or therapist to assess the nature and severity of the trauma, psychological or emotional harm <ul style="list-style-type: none"> <li>• Includes for the purposes of psychiatric or psychological therapy (defined as including counselling)</li> <li>• Circumstances must give rise to a duty or reasonable expectation of confidentiality</li> </ul>	proceedings	leave of the court appear to make submissions <ul style="list-style-type: none"> <li>• Presence of third party support person does not negate privilege if the presence was necessary to further the counselling process</li> </ul>	<ul style="list-style-type: none"> <li>• Wider than other jurisdictions in that it covers communication made in confidence <i>by a support person</i> in the course of counselling (parent/carer/ other support person)</li> <li>• Includes counsellor-counsellor communications if both have counselled that person</li> <li>• Presence of third party support person does not negate privilege</li> </ul>
<b>Criminal – Other Proceedings (eg. trial)</b>	No specific provision	<b>Yes</b> <i>Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 58</i>  Unlike the preliminary proceedings, the court can grant compel	No specific provision	<b>Yes</b> <i>Criminal Procedure Act 1986 (NSW) s 298</i>  Unlike the preliminary proceedings, the court can grant leave to compel production.	<b>Yes</b> <i>Evidence Act s 56B</i>  Not to be adduced or produced as evidence at hearing or at trial <u>without leave of the court</u>	<b>Yes</b> <i>Evidence Act 1929 (SA) s 67E and s 67F</i>  Permission of the court may make the evidence admissible	<b>Yes</b> <i>Evidence Act 2001 s 127B(3)</i>  As per preliminary proceedings.	<b>Yes</b> <i>Evidence (Miscellaneous Provisions) Act 1958 (VIC) s 32C</i>  As per preliminary proceedings.	<b>Yes</b> <i>Evidence Act 1906 (WA) s 19C</i>  As per preliminary proceedings.

	CTH	ACT	QLD	NSW	NT	SA	TAS	VIC	WA
		production.  <u>Definitions: s 54 and 55</u> Requirements are as above		<u>Definitions: s 296</u> Requirements are as above					
<b>Civil</b>	No specific provision	No specific provision	No specific provision	<b>Yes</b> <i>Evidence Act 1995</i> (NSW) s 126H  Privilege applies if substantially same acts are in issue that were in issue in the criminal proceeding	No specific provision	No specific provision	No specific provision	<b>Yes</b> <i>Evidence (Miscellaneous Provisions) Act 1958</i> (VIC) s 32C  Privilege applies to any "legal proceeding". Definition in s 3 provides for "any civil criminal or mixed proceeding"	No specific provision
<b>Family Court</b>	No specific provision	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

- Note that for Family Court matters, evidence is governed by both the *Evidence Act 1995* (Cth) and the *Family Law Act 1975* (Cth).