

Direction for the Department of Family and Community Services and Associated Agencies

As Privacy Commissioner appointed under Part 4, Division 1 of the *Privacy and Personal Information Protection Act 1998 (NSW)* (the PPIP Act), I Elizabeth Coombs, hereby direct pursuant to section 41 of the PPIP Act that:

Overview

1. This is a direction made under section 41(1) of the PPIP Act. It should be read in conjunction with that Act.

Interpretation

2. In this Direction:
 - "**agency**" means public sector agency as defined in section 3 of the PPIP Act;
 - "**authorised person**" is a medical practitioner, health worker or other official or employee providing health or community services who is employed or engaged by a public sector agency.
 - "**guardian**" has the same meaning as in Part 2 or 3 of the *NSW Guardianship Act 1987 (NSW)*.
 - "**next most appropriate person**" includes any individual coming under the definition of **persons responsible** as defined in section 33A of the *NSW Guardianship Act 1987 (NSW)*, but not necessarily according to the hierarchy set out in that section; or an advocate appointed to represent a particular individual's best interests.
 - "**section**" refers to sections of the PPIP Act unless stated otherwise.

Application

3. This Direction will cover the following divisions within the Department of Family and Community Services (FACS) and the nominated Business of Ageing, Disability and Home care (including the Office for Ageing) and the Disability Council within that Department:
 - Aboriginal Housing Office
 - Community Services
 - Housing NSW

It is also intended to cover the Aboriginal Affairs division (within the Department of Education (DoE)) and the division of Juvenile Justice and the nominated business of the Guardianship Division of the NSW Civil and Administrative Tribunal (within DoJ).

Public Interest

4. This Direction has been made to allow each agency specified in this Direction to depart from the Information Protection Principles in the PPIP Act as set out in this Direction for the purposes set out in this Direction. I am satisfied that the public interest in making this

Direction to enable the agencies specified in this direction to depart from the information protection principles identified in this Direction for the purposes identified in this Direction is greater than the public interest in requiring the public sector agencies specified in this Direction to comply with the information protection principles specified in this Direction.

Provisions

5. This Direction aims to resolve three interrelated difficulties faced by the three agencies as referred to above (Divisions of FACS, DoE and DoJ), in collecting, using and disclosing personal information about individuals. It does this by providing for the following exemptions from the information protection principles in the PPIP Act:
 - 5.1. Where an individual is:
 - not able to provide fully informed consent to the collection, use or disclosure of personal information relating to them;
 - 16 years of age or over; and
 - does not have a legally appointed guardian with power to make a decision on their behalf regarding the information;then, in matters involving collection, use and disclosure of personal information pursuant to the PPIP Act consent must be sought from the next most appropriate person.

This consent can only operate where reasonable steps have been taken to involve the individual about whom the information relates in the consent process.
 - 5.2. In circumstances where:
 - there is no imminent threat to the life or health of the individual concerned; and
 - sensitive personal information must be collected or disclosed for appropriate planning for individual clients in the context of preventing harm to the individual or others, or significant damage to property;then, collection of personal information from, or disclosure of, personal information to a person or organisation delivering a service to the individual, to whom the information relates, is permitted.
 - 5.3. Limited disclosure of personal information including sensitive personal information to non-government professionals and organisations may be made, provided that a confidentiality agreement exists with that professional or organisation and it is not practicable to obtain the appropriate authority for disclosure from the person, guardian or next most appropriate person.
6. This Direction has been written primarily to provide for the involvement of guardians or the next most appropriate person in situations where an individual does not have the capacity to consent to the collection, use and disclosure of their personal information. Wherever possible reasonable steps must be taken to involve individuals throughout the process of collection, use and disclosure of their personal information.
7. In limited circumstances, this Direction allows the disclosure of personal information to a person or organisation delivering a service to the individual, to whom the information relates.

Disclosure may occur in this manner, where it is not reasonable in the circumstances to obtain consent for the disclosure from the guardian or next most appropriate person, and where it is appropriate to the treatment or care of the individual, the compilation of an

individual service plan or is otherwise required to ensure the appropriate priority and or placement of the individual in a service.

Disclosure may also be reasonably necessary, in order to make a decision, which requires the balancing of the legitimate interests of other individual service users against the interests of the individual, to whom the information relates. Disclosure in this manner may only occur, where it is essential to the prevention of harm to the individual or others, or to prevent significant damage to property.

This Direction permits disclosure of information, in circumstances where the consent of the individual, the guardian or the next most appropriate person cannot be obtained, to non-government health care workers and non-government organisations engaged or funded by the Department where those persons or organisations have entered a confidentiality agreement with the Department, prohibiting the disclosure of personal information to any other person or body, without the written permission of the individual's guardian or the next most appropriate person.

Modification of Information Protection Principles

Under this Direction the following Information Protection Principles will be modified:

Section 9

9. There is no intention to depart from the requirements of section 9 with two exceptions:
 - (1) Where the individual is 16 years of age or over and is incapable of giving consent to the collection of personal information and where all practicable steps have been taken to obtain the views of the person.

Where the individual has a guardian appointed under Part 2 or 3 of the *NSW Guardianship Act 1987 (NSW)* the guardian will, for the purposes of sections 9 and 10, act for and on behalf of the individual to whom the information relates where the guardianship order encompasses such decisions.

Where the individual does not have the capacity to consent and there is no guardian appointed with the relevant functions, then the next most appropriate person will be deemed to be acting for and on behalf of the individual to whom the information relates.

This consent can only operate where reasonable steps have been taken to involve the individual about whom the information relates in the consent process.
 - (2) In limited circumstances this Direction allows the collection of personal information from a person or organisation delivering a service to the individual, to whom the information relates. Collection may occur in this manner where it is not reasonable in the circumstances to collect the information from the guardian or next most appropriate person and, where it is appropriate to the compilation of an individual service plan or is otherwise required, to ensure the appropriate priority and or placement of the individual in a service. Collection may also be reasonably necessary in order to make a decision, which requires the balancing of the legitimate interests of other individual service users against the interests of the individual, to whom the information relates. Collection in this manner must only occur where it is essential to the prevention of harm to the individual or others or to prevent significant damage to property.

Section 10

10. There is no intention to depart from the requirements of section 10 except in cases, where information has been collected from or authorised by the guardian or the next most appropriate person and where the individual has been unable to consent to the collection as outlined in section 9 (1) above. In these situations, the guardian or next most appropriate person must be informed as to the fact of collection, the purposes of that collection the intended recipients of that information and the other matters set out in section 10.

Section 14

14. There is no intention to depart from the requirements of section 14, except that the right to access that would otherwise be available to the individual, to whom the information relates, may be exercisable, at the discretion of the Divisions within FACS and Associated Agencies nominated above, by the person's guardian or next most appropriate person.

Section 15

15. There is no intention to depart from the requirements of section 15, except that the right to request amendments, that would otherwise be available to the individual to whom the information relates, may be exercisable, at the discretion of the Divisions within FACS and Associated Agencies nominated above, by the person's guardian or next most appropriate person.

Section 17

17. There is no intention to depart from the requirements of section 17, except in cases where the individual is 16 years of age or over and is incapable of giving consent to use personal information, for a purpose other than that, for which it was collected. In that case, consent is required to be obtained from the guardian or next most appropriate person, in the same manner, as it is required in sections 9 and 10 above.

Section 18

18. Where an individual is incapable of giving consent for the disclosure of personal information, consent may be obtained from the guardian or next most appropriate person in the same manner, as it is required in sections 9 and 10 above.

Section 19

19. There is no intention to depart from the requirements of section 19, except where the individual is 16 years of age or over and is incapable of giving consent to use personal information and where all practicable steps have been taken to obtain the views of the person.

Health Information

20. This Direction does not apply to 'health information', as defined in section 6 of the *Health Records and Information Privacy Act 2002 (NSW)*.

Previous Directions

21. This Direction replaces previous directions on this matter.

Duration

19. This Direction has effect from **1 July 2015** to **31 December 2015**, or until legislative amendments are made to incorporate this Direction, whichever is earlier.

Signed by me on **19 June 2015**

Dr Elizabeth Coombs
Privacy Commissioner