

MEMORANDUM OF UNDERSTANDING

Dated the15th..... day ofOCTOBER.....2019

BETWEEN

THE COMMISSIONER for and on behalf of the AGED CARE QUALITY & SAFETY COMMISSION (the ACQSC)

AND

THE COMMISSIONER for and on behalf of the NSW HEALTH CARE COMPLAINTS COMMISSION (the HCCC).

BACKGROUND:

A. The ACQSC is established under the *Aged Care Quality and Safety Commission Act 2018* to assist the Commissioner to perform functions within the Act that include dealing with complaints about an approved provider's responsibilities under the *Aged Care Act 1997* or *Aged Care Principles* or about the responsibilities of a service provider of a Commonwealth-funded aged care service under the funding agreement that relates to the service.

B. The HCCC is an independent statutory authority established pursuant to the *Health Care Complaints Act 1993 (NSW)* [the HCC Act] to deal with complaints about health service providers by receiving and assessing complaints about health service providers, by either resolving complaints or assisting in the resolution of complaints or investigating serious complaints. The Commission also prosecutes serious complaints against registered health practitioners before the relevant professional standards committee or the NSW Civil and Administrative Tribunal. The Commission also investigates and can make orders regarding the practice of unregistered health practitioners.

C. This Memorandum of Understanding (MOU) documents the shared operational understandings and agreed protocols of the parties with respect to the exchange of information in the course of exercising their functions and powers under applicable legislation. The document also outlines the respective roles and responsibilities of, and the relationship between, the Parties in relation to:

- i. Information disclosure relevant to the responsibilities of each party;
- ii. Referrals of information relevant to the responsibilities of each party
- iii. The administrative arrangements for the Parties to communicate with each other in respect of information disclosure;
- iv. Protocols to apply when a Party is compelled by law to disclose the other party's information to a third party (eg. in response to a subpoena);
- v. The governance arrangements in respect of this MOU.

The parties have reached the following understandings:

1. RESPONSIBILITIES OF PARTIES

- (a) The operational arrangements, understandings and protocols reached between the parties are contained in this Memorandum of Understanding (MOU), which includes the Schedules signed by the parties.

2. TERM (Indefinite Term)

- (a) This MOU takes effect from the above-mentioned date and continues until it is either:
 - (i) superseded by a subsequent MOU of the parties, or
 - (ii) terminated, at the written request of one of the parties, provided that such termination should, whenever possible, only occur after some prior consultation with the other party.

3. REVIEW and AMENDMENT

- (a) The parties intend to review this MOU as follows;
 - (i) every two years from the commencement date of this MOU, or
 - (ii) if circumstances, legislative amendment or other matters so require the MOU to be reviewed or amended.
- (b) Any amendments to this MOU must be made in writing and signed by persons holding the equivalent offices of the original signatories.

4. CONFIDENTIALITY

- (a) The parties understand that in the absence of any overriding legislative authority they are required to comply with the relevant provisions of the *Aged Care Quality and Safety Commission Act 2018*¹ (the ACQSC Act), the *Privacy Act 1988* (CTH) and the *Privacy and Personal Information Protection Act 1998* (NSW) and any other applicable legislation governing the subject matter of this MOU.
- (b) The parties hereby undertake to keep all information obtained under this MOU confidential, subject to disclosure being required by law, in which case the Parties will comply with the terms of this MOU in respect of the release.
- (c) The parties will ensure that the information exchanged or provided under this MOU will only be used for the purposes specified herein and that, further, access to such information will be limited to only those officers of the HCCC who require such information for the purpose of carrying out functions under the HCC Act², and officers of the ACQSC for the purpose of administering the ACQSC's functions under the ACQSC Act.

¹ Sections 61 and 62

² Noting that statutory functions to assess, investigate and prosecute complaints necessarily involve the provision of information to Health Professional Councils, experts, respondents and disciplinary bodies.

5. PRODUCTION OF INFORMATION

- (a) Pursuant to section 99A(2) of the HCC Act the HCCC is not compellable to produce documentation. The Commission or a member of Commission staff has a discretion to produce documentation under section 99B only when consideration and regard has been had to the factors outlined in section 99(2).
- (b) Where the HCCC exercises its discretion to produce documentation under section 99B relating to any material, document or information provided under this MOU ("the MOU documents"), the HCCC will:
 - (i) Immediately notify the ACQSC of the request to produce documents;
 - (ii) Identify the MOU documents they intend to produce and allow ACQSC sufficient time to object to their production if necessary, and
 - (iii) In the situation where the ACQSC informs the HCCC that it intends to object to their production in accordance with this clause, produce the objected information in a separate, sealed envelope into Court and notify the Court that ACQSC objects to production of their MOU documents and will be making an application to resist production.
- (c) In the situation where a request is made to the ACQSC for documentation provided to it by the HCCC, the ACQSC will:
 - (i) Immediately notify the HCCC of the request to produce documents;
 - (ii) Identify the MOU documents they intend to produce and allow HCCC sufficient time to consider exercising their rights under section 99A(2) of the HCC Act
 - (iii) In the situation where the HCCC informs the ACQSC that it intends to object to production of their MOU documents in accordance with this clause, produce the objected information in a separate, sealed envelope into Court and notify the Court that HCCC objects to their production and will be making an application to resist production.
- (d) There is an expectation that both parties will consult with the other in respect of any claim of privilege or application in relation to the production of MOU documentation with sufficient time to allow for either party to arrange for their own representation if the circumstances warrant it.

6. INFORMATION VERIFICATION

- (a) The parties will use their best endeavours to ensure the correctness and integrity of the information and material provided to the other party.
- (b) Each party will act upon or deal with information and material provided to it according to its own judgement and assessment of the information provided to it and at its own risk.
- (c) Should a party become aware that information that it has provided to the other party is inaccurate, incorrect or unreliable, where possible it will inform the other party of the inaccuracy.

7. DISPUTE RESOLUTION and TERMINATION PROCESS

- (a) In the case that a dispute arises out of, or in relation to any operational arrangements, understandings or protocols in this MOU, the parties will endeavour in good faith to resolve such matters promptly.
- (b) A dispute may be referred to the parties' representatives, nominated in Schedule 1, who will use their best endeavours to resolve the dispute.
- (c) Where the dispute cannot be resolved, either party may terminate the MOU by giving the other party notice in writing.

8. NO CONTRACTUAL OR ENFORCEABLE LEGAL RELATIONS TO ARISE and RELATIONSHIP WITH LEGISLATION

- (a) The parties do not intend this document to create legal relations or constitute a legally binding contractual agreement between them, or to be the subject of any court, mediation, or arbitration proceedings.
- (b) The parties expressly acknowledge that this MOU is not a substitute for any legislation and therefore cannot override any provision in legislation that is inconsistent with this MOU including any Schedule hereto.
- (c) The parties acknowledge that any release of information by the HCCC to the ACQSC will be made in accordance with s.99B of the HCC Act, having specific regard to the matters set out in s.99B(2) and the principle set out in s.3(2) of the HCC Act
- (d) The parties acknowledge that any release of information by the ACQSC to the HCCC will be made in accordance with ss.61 and 62 of the ACQSC Act,

9. FORM OF REQUESTS

In order to ensure that the parties comply with the relevant legislative provisions,

- (a) All requests for information or documents made by the HCCC to the ACQSC under this MOU for the purpose of the HCCC's functions under the HCC Act will be made in writing and signed by an authorised officer. All requests will set out the information requested, how it will be used³, and identify the health practitioner(s) and/or aged care workers the subject of the request.
- (b) All requests for information or documents made by the ACQSC to the HCCC under this MOU, for the purpose of the ACQSC's functions under the ACQSC Act will be made in writing and signed by an authorised officer. All requests will set out the information that is requested, how it will be used⁴, and identify the health practitioner(s) and/or aged care workers the subject of the request.

³ Including any use, or potential use, that will involve disseminating the information to outside parties (e.g. co-regulatory bodies, experts, respondents) or for the purpose of proceedings before a Court, Tribunal or other body.

⁴ Including any use, or potential use, that will involve disseminating the information to outside parties (e.g. co-regulatory bodies, experts, respondents) or for the purpose of proceedings before a Court, Tribunal or other body.

10. USE OF INFORMATION

- (a) Where information released in accordance with this MOU relates to a matter that is under investigation, or is being prosecuted, by the party that has released the information, the receiving party is not to make any active use of that information:
 - (i) prior to consulting with the agency that has released the information, and
 - (ii) other than in consultation with the party that has released the information.

11. NOTICES

- (a) Any notice in writing pursuant to this MOU is to be given to the persons specified in the Schedules or such other person as is specified in writing to the other party.

SIGNING PAGE

AGED CARE QUALITY & SAFETY COMMISSION

SIGNED by the Commissioner of the
Aged Care Quality & Safety Commission
Janet Anderson

J. M. Anderson
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15 October 2019
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Dated

HEALTH CARE COMPLAINTS COMMISSION

SIGNED by the Commissioner of the
Health Care Complaints Commission
Sue Dawson



14 October 2019.
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Dated

SCHEDULE 1

PARTIES REPRESENTATIVES

Referrals, Notices, including requests for information as specified in Schedules 2 and 3, pursuant to this MOU are to be served upon the following representatives or such other person as is nominated, from time to time, in writing to the other party.

IN RESPECT OF THE AGED CARE QUALITY & SAFETY COMMISSION:

Full name or title: Commissioner, or
National Manager Complaints Operations, or
Director NSW/ACT Complaints Resolution, or
Regional Director NSW/ACT Quality Assessment and Monitoring

Address for service: ACQSC
PO Box 9819
Sydney NSW 2001

Email: ComplaintsNSWACT@agedcarequality.gov.au

IN RESPECT OF THE HEALTH CARE COMPLAINTS COMMISSION:

Full name or title: Commissioner, or
Executive Director of Complaints Operations, or
Managers of Complaints Operations, or
Legal Officer of Complaint Operations, or
Executive Officer of Complaint Operations

Address for service: Health Care Complaints Commission
LOCKED BAG 18
STRAWBERRY HILLS NSW 2012

Email: hccc@hccc.nsw.gov.au

SCHEDULE 2

ACQSC's role and obligations under this MOU

Part A

The ACQSC, upon receipt of a request from the HCCC which is:

- (a) in writing, *and*
- (b) signed by an authorised officer of the HCCC, *and*
- (c) which specifies it is made for the purpose of carrying out a function under the HCC Act, *and*
- (d) relates to one specified person (" the Subject Person"),

will provide the HCCC at the discretion of the relevant delegate, the following information (excluding any information that is privileged*) for the purposes of carrying out functions under the *Health Care Complaints Act 1993 (NSW)*:

- i. Copy of any complaint to the ACQSC;
- ii. Copy of any witness statements;
- iii. Copy of any interview material; and
- iv. Copies of any exhibits that may be copied such as photographs, electronic files;

in respect of the Subject Person.

*Some examples of information that may be privileged are:

- i. Information relied upon for the application of a disclosure notice, or
- ii. Information supplied to the ACQSC in confidence by another party, or
- iii. Information disclosing ACQSC sources or informants.

Part B

The ACQSC will, in respect of any information provided to its officers by the HCCC under this MOU:

- (a) maintain such information in a secure environment, and
- (b) ensure that access to such information will be limited to only those officers of the ACQSC who require such information for the purpose of administering ACQSC's functions under the *Aged Care Quality and Safety Commission Act 2018 (CTH)*.

SCHEDULE 3

HCCC's roles and obligations under this MOU

Part A

The HCCC will, in respect of any information provided to its officers by the ACQSC under this MOU:

- (a) maintain such information in a secure environment, and
- (b) ensure that access to such information will be limited to only those officers, of the HCCC, who require such information for the purpose of carrying out functions under the *Health Care Complaints Act 1993* (NSW) ("the Act").

Part B

- (c) Subject to the following notations, the HCCC will provide the ACQSC with any information (and which term includes sound or video recordings of any HCCC enquiry, "recording") or documents that are requested, in writing, by officers of the ACQSC, for the purpose of carrying out functions under the *Aged Care Quality and Safety Commission Act 2018* (CTH).

Note 1: Any information or answers provided to the HCCC and which are rendered inadmissible, in civil or criminal proceedings, by reason of the operation of sub-section 37A(2) of the Act, need not be provided by the HCCC.

If such (inadmissible) information or answers are provided by the HCCC, then the recording, documents or transcripts containing such (inadmissible) information or answers are to bear the following marking on the top of each page or hardcover medium, as applicable:

"Warning: The information contained in this document/recording is inadmissible, in civil or criminal proceedings, by reason of the operation of sub-section 37A(2) of the *Health Care Complaints Act 1993* (NSW)."

Where a recording contains both inadmissible and admissible information, its hardcover medium is to contain the following warning:

"Warning: Please be aware that some information contained in this recording is inadmissible, in civil or criminal proceedings, by reason of the operation of sub-section 37A(2) of the *Health Care Complaints Act 1993* (NSW)."

For the sake of clarity, sub-section 37A(2) of the Act does not apply to any *document* that came into existence prior to the date of a request for its production, by the HCCC, and such request being made pursuant to section 34A(1) of the Act .

Note 2: Any expert report obtained by the HCCC in the course of an investigation are rendered inadmissible in any proceedings other than one under the *Health Practitioner Regulation National Law (NSW)* without the consent of the expert who write the report, the complainant and the person the subject of the complaint, by reason of the operation of sub-section 30(4) of the Act, need not be provided by the HCCC.