

Information sharing and complaint referral Memorandum of Understanding (**MOU**) *Ombudsman Act 1974 ss 42, 43*

Health Care Complaints Commission and NSW Ombudsman

What this MOU is about

- 1 This MOU sets out the arrangements between the Health Care Complaints Commission (**Commission**) and the NSW Ombudsman for:
 - (a) sharing information about the complaints they have dealt with or are dealing with (Part 1 below), and
 - (b) referring complaints to be dealt with by the other (Part 2 below).
- 2 In this MOU, the Commission and the Ombudsman are referred to as the Agencies.
- 3 This MOU constitutes an arrangement under and for the purposes of ss 42 and 43 of the Ombudsman Act. Unless otherwise stated, all references to sections are references to the Ombudsman Act.
- 4 Nothing in this MOU limits the operation of the *Health Care Complaints Act 1993 (HCC Act)* or any other Act in so far as it permits or requires the Agencies to share information or refer complaints.
- 5 This MOU does not apply to complaints made or referred to the Ombudsman about the conduct of the Commission itself.

Relevant functions of Agencies

The Commission

- 6 The Commission is an independent statutory body established pursuant to the HCC Act.
- 7 The statutory functions of the Commission include receiving, dealing with, and investigating complaints under s 7 of the HCC Act and/or s 144 of the Health Practitioner Regulation National Law (NSW) (**National Law**), being complaints:
 - (a) about the conduct of health practitioners
 - (b) concerning a relevant health organisation, including an alleged breach of a code of conduct

- (c) concerning a health service that affects or is likely to affect the clinical management or care of individual clients.

8 The statutory functions of the Commission also include:

- (a) prosecuting serious complaints against registered health practitioners before a disciplinary body, including the NSW Civil and Administrative Tribunal
- (b) providing an alternate and neutral means of resolving complaints that is independent of the investigative processes of the Commission, including through conciliation
- (c) making prohibition orders against relevant health organisations and non-registered health practitioners
- (d) issuing warnings to the public about a particular treatment, health service or health service provider where it poses a risk to public health and safety.

The NSW Ombudsman

9 The Ombudsman is an independent integrity officer appointed under the Ombudsman Act.

10 The Ombudsman employs staff in a separate executive agency ('Ombudsman's office') under the *Government Sector Employment Act 2013*, and is also a separate GSF agency under the *Government Sector Finance Act 2018*. In this MoU, NSW Ombudsman refers to both the office of Ombudsman as well as the NSW Ombudsman's office, unless the context requires otherwise.

11 The statutory functions of the NSW Ombudsman include:

- (a) receiving and handling complaints about conduct, relating to a matter of administration, of public authorities (as defined in the Ombudsman Act, other than 'excluded conduct' of public authorities under Sch 1) and community service providers (as defined in *Community Services (Complaints, Reviews and Monitoring) Act 1993 (CS-CRAMA)*)
- (b) investigating the conduct of public authorities and community service providers where it appears that the conduct may constitute or include maladministration or other wrong conduct relating to a matter of administration (s 26 of the Ombudsman Act), and
- (c) investigating complaints about community service providers where the complaint raises a significant issue of public safety or public interest, or a significant question as to the appropriate care or treatment of a person by a community service provider (s 27 of CS-CRAMA).

12 The statutory functions of the NSW Ombudsman also include:

- (a) reviewing the complaints-handling systems of public authorities and community service providers
- (b) monitoring and assessing Aboriginal programs
- (c) reviewing the situation of children in care
- (d) reviewing the deaths of certain children, and convening and supporting the Child Death Review Team
- (e) monitoring and reviewing the delivery of community services and related programs

- (f) overseeing the *Public Interest Disclosures Act 1994 (PID Act)* and the *Public Interest Disclosures Act 2022* (due to commence in October 2023), including conducting compliance audits of public authorities, and
- (g) monitoring and reporting on the operation of the *Mandatory Disease Testing Act 2021*.

Purpose and principles

- 13 The Agencies acknowledge the importance of information sharing and complaint referral to support the exercise of their respective functions, including to ensure that complaints are assessed, investigated or otherwise resolved in the most effective and timely manner.
- 14 The Agencies agree to apply the information-sharing and complaint-referral authorities within their legislation and under this MOU to mutually support each other in the exercise of their functions. This includes working co-operatively to support the following principles:
 - (a) as far as practicable, complainants should experience ‘no wrong door’ and be assisted through the provision of information about, and if appropriate complaint referral to, the most appropriate agency to deal with their complaint
 - (b) when an Agency receives a complaint (whether or not it is within or partly within its own jurisdiction), it should consider whether it would be more appropriately dealt with by the other Agency.
 - (c) to the extent permissible, each Agency should seek to identify and share with the other Agency information that will assist the other Agency to carry out its functions.

Part 1 – Sharing Information

Information the Agencies can share with each other under this MOU

Note – this Part governs the sharing of information under Part 6 of the *Ombudsman Act 1974*. Nothing in this MoU prevents the Commission is permitted to share information, independently of this MoU, under HCC Act s99B or Ombudsman Act s43(7).

- 15 Each Agency may share with the other Agency information it has obtained with respect to a complaint it has dealt with.
- 16 However, the sharing Agency may only share such information with the other Agency under this MOU if:
 - (a) it is reasonably necessary to assist the other Agency to carry out its functions, and
 - (a) where the sharing Agency has reason to suspect, or should have reason to suspect, the information is or includes sensitive personal information about a complainant (see 20 below) – the complainant has expressly consented to the information being shared, subject to clause 21 below.
- 17 Information can be shared in accordance with this MOU despite any other Act or law: s 43(3), (4).

How information is shared

- 18 When sharing information under this MoU, the sharing Agency will notify the other Agency of:
- (a) the general nature of the information it holds, or of the investigation or hearing it is to conduct (without disclosing sensitive personal information about any complainant)
 - (b) how it proposes to deal with the information, apart from potentially sharing it under this MoU
 - (c) whether it suspects the information is or includes sensitive personal information about a complainant
 - (d) whether there is any law or other obligation restricting the use and disclosure of the information, and
 - (e) whether it intends to share the information with any other person or to permit any other person to be present during the investigation or hearing.
- 19 The other Agency may make further inquiries of the sharing Agency in relation to the information.
- 20 Sensitive personal information about a complainant must not be shared without the complainant's express consent, subject to clause 23 below. Sensitive personal information means information relating to the complainant's:
- (a) ethnic or racial origin
 - (b) political opinions
 - (c) religious or philosophical beliefs
 - (d) trade union membership
 - (e) health, or
 - (f) sexual activities: s 41
- 21 Clause 20 does not apply to the Commission if the Commission is sharing information under s 41(2)(b) and/or s 99B HCC Act.

Part 2 – Referring complaints

Complaints the Agencies can refer to each other

- 22 Each Agency may, with the consent of the complainant, refer to the other Agency any complaint it has received if it appears to the other Agency that the complaint is within, or partly within, the other Agency's jurisdiction.
- 23 If the Commission is referring a complaint to the Ombudsman under s 26 HCC Act, the consent of the complainant is not required.
- 24 The referring Agency may refer a complaint to the other Agency:
- (a) whether or not the complaint is also within or partly within the jurisdiction of the referring Agency
 - (b) whether or not any investigation or other action has been taken, or is proposed to be taken,

in relation to the complaint by the referring Agency

- (c) whether or not the referring Agency has also referred, or proposes to refer, the complaint to any other person.
- (d) However, the Commission must continue to deal with the matter the subject of the complaint (or part) if it appears to the Commission that—
 - i. the matter raises a significant issue of public health or safety, or
 - ii. the matter raises a significant question as to the appropriate care or treatment of a client by a health service provider, or
 - iii. the matter, if substantiated, would provide grounds for disciplinary action against a health practitioner or relevant health organisation.

25 Without limiting the above, the Agencies agree that:

- (a) if the Ombudsman receives a complaint that includes a matter of the kind described in clause 7 above, or as described in relevant legislation, then the Ombudsman will seek, in as timely a manner as possible, to refer the complaint (in so far as it relates to that matter) to the Commission under this MOU, and
- (b) if the Commission:
 - i. receives a complaint that includes a matter of the kind described in clause 11 above, and
 - ii. that matter is not also of the kind described in clause 7 above (that is, the Commission does not have jurisdiction to investigate that matter),

the Commission will seek, in as timely a manner as possible, to refer the complaint (in so far as it relates to that matter) to the Ombudsman under this MOU.

How complaints are referred

26 When referring a complaint, the referring Agency will notify the other Agency in writing of:

- (a) the nature of the complaint (without disclosing any sensitive personal information about the complainant)
- (b) the basis on which it appears the complaint falls partly or wholly within the other Agency's jurisdiction
- (c) what, if any, steps have been taken in relation to the complaint
- (d) what, if any, steps the referring Agency intends to take in response to the complaint (other than referring it).

27 The other Agency that receives a referral:

- (a) may make further inquiries about the notice for the purposes of determining whether the complaint is within, or partly within, its jurisdiction and should be referred, and
- (b) is to advise the referring Agency whether, in its view, the complaint should be referred or not referred.

- 28 No complaint may be referred under this MOU without the complainant's express consent unless it is a referral under s26 HCC Act.

Part 3 - General provisions

Other obligations

- 29 Each Agency will ensure that its relevant staff are aware of:
- (a) the general types of information that may be relevant to, and of complaints that might be referred to, the other Agency
 - (b) the process set out in this MOU for sharing information and referring complaints
 - (c) the need for timeliness in sharing information or referring complaints.
- 30 An Agency will ensure that any information received from the other Agency under this MOU will only be used for the purpose of exercising its functions under, and in accordance with, its relevant governing legislation.

Resolving disagreements

- 31 The Agencies will use reasonable endeavours and good faith to resolve any differences concerning and arising out of the interpretation of this MOU by consultation
- 32 Any disagreement about the application of this MOU or arising out of this MOU will in the first instance be referred to the contacts for each Agency nominated in the attached Fact Sheet for resolution.
- 33 If any dispute is not resolved after the best efforts of the Agencies, the matter will be referred to the Commissioner and the Ombudsman for resolution.
- 34 Where the dispute cannot be resolved, either Agency may terminate the MOU by giving at least one month's notice in writing to the other Agency.

Commencement, review and termination of this MOU

- 35 This MOU commences once it is signed by both Agencies, and replaces all previous MOUs or similar arrangements between the Agencies under ss 42 and 43.
- 36 The Agencies will review the operation and effectiveness of this MOU:
- (a) if there is a change in circumstances, including legislative amendment, that affects the terms or intended operation of the MOU, or
 - (b) as otherwise agreed by the Agencies.
- 37 Either Agency may terminate this MOU by giving at least one month's notice in writing to the other Agency.

Public availability of Memorandum of Understanding

38 This MOU is open access information under s 6 of the *Government Information (Public Access) Act 2009* and is also required to be made publicly available in accordance with s 45. It will be made available on the websites of the Commission and the Ombudsman.



Sue Dawson
Commissioner of the Health Care Complaints
Commission

Date: 12 July 2023



Paul Miller
NSW Ombudsman

Date: 24 July 2023