



NAAH

NSW Association for Adolescent Health

# Working With Young People

## Ethical and Legal Responsibilities for Health Workers

A Resource For Health Workers In NSW  
February 2005



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*Disclaimer: You should not rely solely on the information in this resource, but should also refer to other publications and authorities and if necessary get qualified advice for your specific situation. We have attempted to include all the relevant requirements of NSW and Australian law as at 2005. However the law is sometimes complex and open to interpretation, and applies to different agencies in different ways. The information here is not legal advice. If there is a real possibility of legal action, you should talk to a lawyer before you decide what to do. Please contact NAAH if you have any comments on this resource.*

A full copy of this report can be downloaded from the NAAH website  
[www.naah.org.au](http://www.naah.org.au)

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# INTRODUCTION

The New South Wales Association for Adolescent Health (NAAH) is the peak body committed to promoting the health and well-being of young people aged 12-25. NAAH is a membership organisation, representing individuals and organisations that work directly with young people around health and well being.

NAAH works closely with Youth Health Services across NSW and with a range of government and non-government bodies. Most of NAAH's work focuses on Youth Health Sector support and training, government liaison and lobbying, policy and resource development and community sector networking. The principles guiding the work of NAAH are a holistic approach to health, inter-sectoral collaboration, empowerment and social justice.

Increasingly, NAAH has been asked to clarify the legal and ethical issues around working with young people. The development of a trusting relationship between health care workers and young people requires that legal obligations of health care workers are made explicit at initial contact. If this does not occur there can be detrimental effects on the working relationships and outcomes for the young person. The young person may not access health care in the future or may not feel able to be open with health care workers and as a result their health may suffer.

This resource aims to articulate the ethical and legal obligations for health workers working with young people. NAAH has consulted with a wide range of organisations to define the areas needing clarification and has worked in partnership with them to develop this document. It is envisaged that this resource will be a useful tool for any health worker working with young people in NSW. This includes nurses, psychologists, social workers, doctors and health promotion staff.

Please note that the law is not always clear and changes from time to time. This document is intended as a guide only and is not a substitute for legal advice.

# DUTY OF CARE

Duty of care is an important component of working with young people in a health setting. Once a young person enters a service, a health worker has a duty of care to act with appropriate skill and judgement and take all reasonable steps to ensure that the young person does not suffer harm as a result of their actions or failure to act. A health worker also has a duty of care to others (non-clients) who may be foreseeably affected by the actions of the worker or the client.

A breach of this duty may occur if a health worker does something that leads to a reasonably foreseeable accident or injury to the young person and has failed to take reasonable steps to prevent it from happening. A *reasonable standard of care* is judged by the standards expected of a normal competent worker of their profession.

Health workers should be familiar with the policies of their workplace and their professional code of ethics regarding working with young people. Professional codes of ethics are usually endorsed by registration boards and/ or professional associations to which health workers may belong.

It is important to realise that some young people, depending on their age and maturity, may be more vulnerable than others. Therefore, a health worker may need to exercise more care when working with that young person. As a health worker, you have a responsibility to ensure that a young person is given all the necessary information regarding the service you are providing. Make sure you give a young person time to reflect on the information you present to them and encourage them to repeat back to you, in their own words, what you have said to ensure they have understood.

# CONFIDENTIALITY

## Health Workers' Responsibilities

Confidentiality in a health care setting can be defined as the right of a client to ensure all the information relating to their health care is not shared with other parties without their permission<sup>2</sup> (*Public Health Act 1991, Health Records and Information Privacy Act 2002, Privacy Act 1988*).

Confidentiality is important in establishing trust in a relationship between a health worker and a young person. Confidentiality clauses may be found in a worker's employment contract, in professional codes of ethics, or in an agreement between a worker and the client. Any breach of confidentiality may be a breach of the law and may also result in discipline by the employer or professional association. Therefore, a health worker should ensure that they are aware of the confidentiality policies that apply to their workplace<sup>7</sup>.

The issue of confidentiality often presents a significant barrier for young people accessing health care. It is a health worker's responsibility to a young person to let them know of their rights regarding confidentiality. To ensure best practice a health worker should do whatever they can to make certain a young person understands their rights regarding confidentiality. It is not adequate to tell a young person once what their rights are, it needs to be continually reinforced with them. For example, where appropriate, ask the young person to explain what they think you mean in a way that requires more than a 'yes' or 'no' answer.

There are exceptions to the duty of a health worker to maintain confidentiality with their client. Health workers should make it very clear to a young person when they may be required to breach confidentiality. It is best practice to ensure that a young person is informed, before they disclose information that may require a breach. The exceptions that should be made explicit to a young person include:

- Where the young person consents for their information to be disclosed to a third party, such as a parent or caregiver
- Where a health worker is bound by law to disclose, such as:
  - Providing documents like health records, or giving evidence in Court under subpoena
  - Notifying NSW Health, for the purposes of epidemiology and monitoring, if the young person has an infectious disease including, but not limited to, HIV/AIDS, Syphilis, Gonorrhoea, Chlamydia and Hepatitis A, B, C, D, E. This need to notify applies only to doctors. (*Public Health Act 1991*)  
**Note:** HIV/AIDS has strict privacy laws that apply to disclosure (see *Disclosure of HIV/AIDS*)
  - Mandatory reporting of children at risk (see *Mandatory Reporting of Children at Risk*)
- Where there is a serious and imminent threat to the life and health of any person (for example a young person is at risk of harming themselves or harming others) (*Privacy and Personal Information Protection Act 1998 s18 and Privacy Act 1988 s14*)
- Where the young person discloses information that would substantially assist in the prosecution of any offence punishable by 5 or more years imprisonment (*Crimes Act 1900 s316*)
- Where disclosure within a organisation is necessary to effectively treat a young person (for example where there are multiple health providers treating a client, but still seek the young persons permission, to disclose any non-urgent communication)<sup>2,7</sup>. **NOTE:** The young person's consent is required for disclosure to healthworkers outside of the organisation.

Confidentiality principles are the same for *all* young people. If you are working with young people from culturally and linguistically diverse backgrounds, or with an intellectual disability or other incapacity, make sure you take extra measures to ensure they understand their rights in regard to confidentiality.

# CONFIDENTIALITY

## Disclosure of Information to Parents or Guardians

In many instances a young person may access a health service and not want their parent or guardian to know why they are there. If you feel that a young person has the capacity to consent to service provision (see *Consent to Service Provision*) then you are not required to inform the parent or guardian of the young person's health information. It is only if the young person does not have the capacity to consent to service provision and/or disclosure of information, that you may be required to release information without the young person's consent.

If a parent or guardian is consenting to service provision on behalf of a young person, you are required to provide all information to the parent or guardian that is necessary to assist them in deciding whether to consent.

Access to health records held by public sector agencies is covered by the *Freedom of Information Act 1989*. Although the Act does not specifically address the situation where a parent or guardian applies for access to a young person's health records, according to the NSW Premier's Department's *Freedom of Information Procedure Manual*, it is acceptable for a parent to make such an application on a child's behalf. However, because the records concern the young person's 'personal affairs', the young person would need to be consulted if reasonably practicable before the information is released (s31). The agency may refuse to release medical or psychiatric information if it is of the opinion that disclosure may have an adverse effect on the mental or physical health of the young person concerned.

Access to health records held by private sector organisations or individuals (for example doctors) is covered by the *Health Records and Information Privacy Act 2002*. Under this Act, a person who has 'parental responsibility' for a young person aged under 18 years is defined as an 'authorised representative' of that person (s8). An authorised representative may obtain access to the young person's health records only if the young person authorises them to make the request on their behalf or does not have the capacity to make their own request (s7). Access to health records may be refused for a variety of reasons, including if the service provider considers that granting access may seriously endanger the life or health of the individual or any other person (s29). For example, if you know that a young person you are treating suffers abuse at the hands of a parent or guardian or fears consequences relating to the release of information, then you may consider it is not in the best interests of the young person to release their health information, even when it is requested by a parent or guardian. It is encouraged that young people are consulted prior to the release of any information.

### Case Study: Mental Illness

**Peter accesses your Health Service and exhibits symptoms of psychosis.**

**Are you permitted to contact his parent or guardian and notify them of his condition?**

**If you consider, in all circumstances, that it would be in Peter's best interests to contact his parent or guardian, then you are permitted to do this. In fact, where you consider that it is important to contact Peter's parent or guardian, then you may have a duty to make reasonable efforts to contact them.**

# CONFIDENTIALITY

## Issues to Consider

### Mandatory Reporting of Children at Risk

Under sections 23-29 of the *Children and Young Persons (Care and Protection) Act 1998*, health workers are mandatory reporters. This means they are **legally required to make a report** to the Department of Community Services (DoCS) Helpline if they have reasonable grounds to suspect a child under the age of 16 is at risk of harm from abuse or neglect.

The Act also states that a health worker **may make a voluntary report** to the DoCS Helpline if they have reasonable grounds to suspect a young person aged 16 or 17 years is at risk of harm from abuse or neglect. Confidentiality in the case of mandatory and voluntary reporting may be breached.

Section 23 of the Act defines risk of harm as any of the following:

- The child or young person's basic physical or psychological needs are not being met or are at risk of not being met
- The parents or caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care
- The child or young person has been, or is at risk of being, physically or sexually abused or ill-treated
- The child or young person lives in a household where there have been incidents of domestic violence, and as a consequence he or she is at risk of serious physical or psychological harm
- A parent or other caregiver has behaved in such a way towards the child or young person that he or she has suffered or is at risk of suffering serious psychological harm.

### Reporting Domestic Violence

Domestic violence poses such a risk that in some cases you should report it to the police against the wishes of the young person (whether victim, witness or perpetrator). The law permits disclosure of health information where there are reasonable grounds for believing that disclosure is necessary to lessen or prevent a serious and imminent threat to the life, health or safety of the individual or another person. Situations of this kind may include where:

- The victim has serious injuries
- The perpetrator has a weapon and has threatened to use it
- The perpetrator has assaulted or threatened anybody on agency premises
- The perpetrator has made threats to or against the agency or staff.

Reporting in these situations without consent is acceptable under privacy law and policy. If a child aged under 16 years is living in a household where domestic violence has taken place, a health worker must comply with the *Children and Young Persons (Care and Protection) Act 1998* and the guidelines for mandatory reporting of children at risk.

# CONFIDENTIALITY

## Cultural Considerations

When determining if a young person is at risk of harm (see *Mandatory Reporting of Children at Risk*) it is important to be aware of the meaning of different cultural practices before making a report. Explain to the young person that certain legal obligations may override particular cultural practices (for example the practice of female genital mutilation performed in Australia or on a young person normally residing in Australia). Please note that some young people have been wrongly assessed as suffering from abuse as a result of certain cultural practices, such as 'cupping', where warmed glass jars are placed on certain points of the body for health medicating reasons, which is seen to be an acceptable practice within Australian law.<sup>2</sup>

Asking the young person and their family members about their cultural practices is a useful way of learning. However, where there is a concern about legal and ethical issues, it is a good idea to consult with a colleague and/or specialist organisation about this. **For further information consult with local Migrant Resource Centres or contact the Transcultural Mental Health Centre, on (02) 9840 3800.**

## Disclosure of HIV/AIDS

It is an offence for a health worker to disclose information to another person regarding HIV/AIDS testing or infection in relation to their client (*Public Health Act 1991 s17*). Disclosure of this information is only warranted in a limited number of specific situations, the most significant of which are:

- If it is necessary for the provision of the service (for example a lab technician would be authorised to give a person's HIV/AIDS test results to their treating doctor)
- If a court or similar body orders disclosure (for example, under subpoena)
- If you know they are behaving in a way that puts others at risk (for example unsafe sex). In this case clause 7 (2) of the Public Health Regulations 1991 allow you to notify the Director-General of the NSW Health Department if you believe a client is behaving in a way that the health of the public is put at risk (*NSW Health Department Circular 2002/84 "Management of people with HIV infection who risk infecting others"*, *NSW Health Department Circular 1998/100 "HIV confidentiality: a guide to legal requirements"*).

### Case Study: Putting Others at Risk

**Grant has HIV/AIDS and is having sexual intercourse with Judy. Do you have a right to inform Judy of Grant's HIV/AIDS status?**

**The Public Health Act 1991 prevents a worker disclosing Grant's condition to Judy without his consent. However, it is also illegal for Grant to have sexual intercourse with Judy without informing her that he is infected with HIV/AIDS (*Public Health Act 1991 s13*). In this case a health worker's responsibility would extend to informing Grant of his legal obligations and encouraging him to let Judy know of his condition and practice safer sex. However, if a worker believes that Grant and Judy are practicing unsafe sex, then the worker has grounds to believe that Judy may be at risk of contracting HIV/AIDS and so may contact the Director-General of NSW Health and inform him/her of the situation without breaching any confidentiality laws. A worker IS NOT permitted to tell Judy of Grant's condition.**

# CONFIDENTIALITY

If staff are concerned about possible health risks relating to a HIV positive person they should contact their local HIV/AIDS Co-ordinator, or the AIDS and Infectious Diseases Unit of the NSW Health Department (*NSW Health Privacy Manual 2004 p31*).

**Note:** A person who knows they are carrying a sexually transmitted infection (STI) must inform their sexual partner of their condition before engaging in sexual intercourse (*Public Health Act 1991 s13*). In the case of STIs (other than HIV/AIDS), or Hepatitis C, a health worker may disclose the infectious status of a client to their sexual partner or other contact if they believe, on reasonable grounds, that it would prevent a serious and imminent threat to the health of the contact.

# Consent to Service Provision

Most adolescents of any age are free to consent to the majority of health services available, provided a health worker can obtain informed consent. Not all of these services are considered medical treatment as they may also include: counselling, provision of information, provision of condoms/ lubricant and health education.

## What is Informed Consent?

Informed consent is where a person is capable of making a decision by weighing up the options available to them based on the information and advice given to them by a health worker<sup>2</sup>. To do this a young person will need to have the *capacity* to, where appropriate:

- Understand the nature of the service or treatment (including any risks, alternative treatments, procedures and consequences of not having the treatment)
- Understand the effect of the service or treatment (including how the client will feel afterwards)
- Weigh up the various services or treatment options and make a decision
- Consent freely to the treatment without threat or duress
- Communicate their decision.

It is part of your duty of care to ensure that the young person is aware of the above factors before they can consent. Take extra care when discussing these with young people whose first language is not English, to ensure they understand.

Informed consent may be implied, verbal or written. Implied consent may relate to a situation where an individual's presence indicates consent, such as a counselling session. Verbal and written consent may relate to other types of medical treatment, such as a pap smear.

## Medical Treatment

The law regarding consent to medical treatment for young people under 18 years old is not straightforward and requires a health worker to decide on a case-by-case basis whether a young person has the capacity to give informed consent. This will depend on the maturity of the young person as well as the seriousness of the treatment (invasive, such as surgery, or non invasive, such as prescriptive medication).

*What does the law say about a young person's capacity to consent to medical treatment?*

- A young person aged under 18 years with sufficient emotional maturity and intellectual capacity to give informed consent is legally capable of consenting to most types of medical treatment in their own right. The High Court of Australia settled this common law test for determining a young person's capacity to consent to medical treatment in a case known as *Marion's case*<sup>3</sup>.
- Section 49 of the *Minors (Property and Contracts) Act 1970* was designed to prevent doctors being charged with assault and battery as a result of performing a medical procedure on a child or young person. A medical or dental practitioner cannot be held liable for assault for treating a young person if:
  - The young person is **aged 14 years and over** and has consented to the treatment **OR**;
  - The young person is **aged under 16 years** and a parent or guardian has consented on behalf of the young person.

# Consent to Service Provision

As long as a child or young person fits the principles outlined in *Marion's case*<sup>3</sup> then they are able to consent to *most* medical treatments. In most cases, a child aged 14 or over will be deemed to have the capacity to consent. However, this will depend on the capacities of the young person and the seriousness of the proposed treatment. A health worker must decide on a case-by-case basis whether the young person has the maturity to give informed consent. As an example, a younger adolescent may have the capacity to consent to the administration of a course of antibiotics to treat a sore throat, however they may not have the capacity to consent to the removal of their tonsils<sup>6</sup>. When deciding if a young person has the capacity to consent to medical treatment, use your common sense and if unsure consult with your colleagues or professional association.

**Note:** *If you have doubts about a young person's capacity to consent, this does not give you an automatic right to breach confidentiality (see Confidentiality).*

## If a Young Person Cannot Consent

If a health worker is not satisfied that the young person seeking medical treatment has the capacity to give informed consent then the additional consent of one parent or guardian is required. To obtain consent to medical treatment from a parent or guardian they must be given all the necessary information to ensure informed consent, as though they were themselves having the treatment.

If the young person is aged 16 years or over, then their 'person responsible' (who may not be their parent) can consent to most medical and dental treatment (see *Intellectual Disability or Other Incapacity*).

**Note:** *Even a competent young person aged under 18 years, or their parent or guardian, cannot consent to 'special types' of medical treatment, which are those that permanently interfere with a person's reproductive ability or personality and behaviour, such as sterilisation or psychosurgery. These treatments require a Court or Tribunal order. However, if this type of treatment is required as a matter of urgency, to save the young person's life or prevent damage to their health, then a medical practitioner may go ahead and treat them without consent (Children and Young Persons Care and Protection Act 1998 s5 and s175; Mental Health Act 1990 s204; Guardianship Act 1987 s35 and s37).*

## Emergency Treatment

If emergency treatment is necessary, as a matter of urgency in order to save a person's life or prevent serious injury to their health and they are:

- Incapable of giving consent (for example they are too ill or unconscious) then consent is not required<sup>6</sup>
- Aged 18 years or over and in a competent state of mind and refuse this treatment, a health worker **cannot** go ahead and treat them over their objections<sup>6</sup>
- Aged under 18 years and they, or their parent or guardian, do not consent to this treatment, a health worker **can** go ahead and treat them if it is in the best interest of the young person (*Children and Young Persons (Care and Protection) Act 1998 s174*).

# Consent to Service Provision

## Issues to Consider

### Termination of Pregnancy

Obtaining consent for an abortion is the same as obtaining consent for other medical treatments. Generally, abortion clinics in NSW require the consent of a parent or guardian before they perform an abortion on a young woman aged under 14 years.

### Homeless Young People

Most adolescents of any age are free to consent to the majority of health services available and the same laws for obtaining consent apply when working with homeless young people.

If you are working with a young homeless person aged under 16 years who cannot consent to medical treatment you will need to obtain the consent of a parent or guardian. However, if the young person has no parent or guardian able to provide consent and:

- Is 'under the parental responsibility of the Minister' you will need to get the consent of DoCS
- Is not 'under the parental responsibility of the Minister' you may need to contact DoCS and have them assist in obtaining consent.

**Note:** You may report the homelessness of a child or young person aged under 18 years to DoCS (*Children and Young Persons (Care and Protection) Act 1998 s120 and s121*). If you believe a homeless child aged under 16 years may be at risk of harm you must report them to DoCS (see *Mandatory Reporting of Children at Risk*).

### Intellectual Disability or Other Incapacity

A young person with an intellectual disability or other incapacity can consent to medical treatment provided they are capable of giving informed consent. A health worker may use alternative means to inform the young person of the proposed treatment such as drawings, photos or physical models (these methods can often be useful for all clients). It is also essential that the young person be given enough time to understand the information and to communicate their decision<sup>2</sup>. If a young person with an intellectual disability is aged under 16 years and cannot consent to treatment a health worker will need to get the consent of a parent or guardian (*see Medical Treatment*).

### Guardianship

If a young person aged 16 years or over does not have the capacity to consent to medical treatment, whether because of an intellectual disability or other incapacity, then the *Guardianship Act 1987* provides a means for obtaining consent. The Guardianship Act establishes who is the 'person responsible' (who may or may not be a parent of the individual) for a person who cannot provide his or her own consent to treatment. The 'person responsible' is able to consent to most medical treatments on behalf of the person not capable. However, a 'person responsible' cannot override a client's objections to treatment and they cannot consent to 'special types' of medical treatment. If the person has no 'person responsible' the Guardianship Tribunal can act as a substitute decision maker or may appoint a guardian to make decisions on the young person's behalf. The power for a 'person responsible' or appointed guardian to consent to medical treatment is known as **substitute consent**<sup>4</sup>.

# Consent to Service Provision

A health worker must obtain substitute consent from a 'person responsible' by providing to that person all the necessary information about the client, to ensure the 'person responsible' can provide informed consent. Obtaining consent from the Guardianship Tribunal may require a health worker to fill out an application for consent to medical treatment form, fax it to the Tribunal and wait for the Tribunal to conduct a telephone hearing. The Tribunal can provide consent over the telephone when necessary and will provide its reasons in writing. The Tribunal can also be contacted by telephone after hours<sup>4</sup>.

A person is a 'person responsible' by virtue of their relationship with a person with a disability or other incapacity. In this situation, there is a hierarchy. If a guardian or enduring guardian has been appointed with the function of giving consent to medical and dental treatment, they are the person's 'person responsible'. If there is no appointed guardian then the next category on the hierarchy is:

- a) The spouse of the person (including a same sex or de facto partner)
- b) A person who has care of the person on an unpaid basis
- c) A close friend or relative of the person who maintains an interest in their welfare.

(*Guardianship Act 1987 s33A*)

**Note:** Under the *Guardianship Act* 'special treatments', such as sterilisation and termination of pregnancy, must be consented to by the Guardianship Tribunal before they can be carried out on an individual aged 16 years or older who is not able to provide their own consent to the procedure (*Guardianship Act 1987 s35*).

### Young People from Culturally and Linguistically Diverse (CALD) Backgrounds

The health needs of young people from CALD backgrounds may differ across cultures and the issue of consent can potentially cause conflict for a young person living in Australia, whose parents and family are from another cultural background. In some cultures it may be the cultural norm for parents and carers to play a significant role in decision making for the young person and their health care. Adolescence is not a universal concept across cultures and does not even exist in some particular cultures (for example Sudanese). Therefore, the issue of consent by young people and/or from a parent or guardian requires consideration and communication within a culturally appropriate framework. On issues concerning their health, young people from some cultures may wish to involve their families more; others may wish to involve them less. Health workers should be guided by information from the young person, duty of care and their legal responsibilities.

When working with young people for whom English is a second language, it is important to remember that informed consent can only be obtained if the person *understands* the nature and effect of the treatment and can *communicate* their decision. Appropriately qualified health care interpreters, rather than family members or friends, should be used where appropriate to ensure young people and their families are capable of giving informed consent<sup>2</sup>. Health care interpreters are available in person and/or by phone and can be contacted through Community Health Centres. Please be aware of clients' concerns surrounding confidentiality when involving translators, especially for those from smaller communities. Contact NSW Health or your local Health Care Interpreter Service for more information.

It is also useful to consult with ethno-specific workers and/or to work with them in liaising with families if need be, where the issue of consent cannot be resolved. These workers are generally available at local Migrant Resource Centres and Community Health Centres. Also check the Multicultural Interagency Directory available at - [www.eccnsw.org.au](http://www.eccnsw.org.au) .

Information and resources in languages other than English, as well as information on culturally appropriate practice and services, are available at - [www.health.nsw.gov.au/health-public-affairs/mhcs/](http://www.health.nsw.gov.au/health-public-affairs/mhcs/)

# Consent to Service Provision

The health needs of refugee young people extend beyond CALD considerations. You should always consider the added impact of trauma on the development of a young person, which may have been delayed or regressed, regardless of their age or stage of 'adolescence'. Furthermore, the young person's experiences can affect their willingness and ability to develop and establish trust within the worker/client relationship.

Information and resources on working with refugee young people are available at - [www.refugeehealth.org.au](http://www.refugeehealth.org.au) or contact the **Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS)**, on **(02) 9794 1900**.

The health needs of Aboriginal or Torres Strait Islander young people may also require different considerations. **Further information is available by contacting The Settlement on, (02) 9698 3087.**

## Testing for HIV/AIDS

Administration of a test for HIV/AIDS is considered to be medical treatment, and the same requirements for informed consent apply. Under the *Guardianship Act 1987* HIV/AIDS testing is classified as 'major treatment' and will require the permission of a 'person responsible' or Guardianship Tribunal before the test can be administered to a person aged 16 years or older who does not have the capacity to consent for themselves (see *Intellectual Disability or Other Incapacity*).

# Sexual Health

## Age of Consent

It is illegal for a person of any age to engage in heterosexual or homosexual intercourse with someone aged under 16 years (*Crimes Act 1900 s66C*). Where both parties are aged under 16 years, technically they are both committing an offence but would not normally be charged unless one is much older than the other or the sex is non-consensual.

If a young person is aged under 18 years and an individual has 'special care' for them (for example they are a school teacher, step-parent, sports coach) it is against the law for this individual to have sex with the young person (*Crimes Act 1900 s73*).

In regards to circumstances in which it is mandatory to report that a young person under 16 years old has engaged in sexual activity, see *Underage Sex*.

## Underage Sex

*A 15 year old person accesses your service and states that she is sexually active and would like some condoms. Are you required to report this young person for having underage consensual sex?*

A health worker is expected to report incidents of underage sexual activity only if the young person is at risk of harm as a result, as defined in section 23(c) of the *Children and Young Persons (Care and Protection) Act 1998* (see *Mandatory Reporting of Children at Risk*). In order for a health worker to determine this they must consider the current definition of sexual abuse as outlined in section 2.1.5 of the *NSW Interagency Guidelines for Child Protection Intervention 2000*, which states that child sexual abuse is:

Any sexual act or sexual threat imposed on a child. Adults and adolescents who perpetrate child sexual abuse exploit the dependency and immaturity of children. Coercion, which may be physical or psychological, is intrinsic to child sexual abuse and differentiates it from consensual sex with a peer.

The *NSW Health Frontline Procedures for the Protection of Children and Young People 2000* (p12), states that:

Careful consideration is necessary because although a child or young person may perceive sexual activity as consensual because of the way the other person involved has promoted it, the situation may be one of sexual abuse and exploitation. The apparent consent of a child or young person may not mean that abuse did not occur.

It is important for a health worker to assess if the young person engaging in underage sex is at risk of harm from sexual abuse due to coercion, intimidation or any other risk factors such as age, disability or lack of support. These factors could result in the other party being potentially more powerful and able to exercise coercion or intimidation over the young person. If unsure, a worker should consult with DoCS or their manager for further advice.

If a young person aged under 16 years is engaging in apparent consensual sex and there are factors that constitute a risk of harm (refer to the *NSW Interagency Guidelines for Child Protection Intervention 2000*) then **a report is required**.

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If a young person aged under 16 years is engaging in consensual sex with a peer and there are no factors that indicate a risk of harm (refer to the *NSW Interagency Guidelines for Child Protection Intervention 2000*) then a **report is not required**.

## Contraception

NSW Health notes that condoms and lubricant should be made available to any person who is currently involved in sexual activity, regardless of their age (*NSW Health Frontline Procedures for the Protection of Children and Young People 2000 p56*). It is also important to ensure that young people are given accurate information regarding safer sex practices. This may be either through written material or advice from a health worker<sup>1</sup>. Providing a young person under the age of 16 years with safer sex advice, condoms and lubricant is not an offence if the ultimate decision to have sex rests with the young person<sup>1</sup>.

Most other forms of contraception (such as oral contraception and diaphragms) are subject to the provisions for consent to medical treatment. Provided a young person can give informed consent for the prescription or administration of such contraceptive methods, the additional consent of a parent or caregiver is not required (*see Medical Treatment*). The only exceptions are for young people aged under 16 years who require injectable contraception (eg: Depo-Provera) or sterilisation. These can only be administered by order of a Court or Guardianship Tribunal<sup>5</sup>.

Emergency contraception otherwise known as the 'morning after pill' can be purchased over the counter at pharmacies. There is no age limit at which a person can purchase this. Pharmacists will ask those requesting the contraception some routine questions in a private location. If the pharmacist has concerns about a younger adolescent requesting the contraception they may refer them to a doctor or Family Planning clinic. Information on emergency contraception is available at [www.emergencycontraception.com.au](http://www.emergencycontraception.com.au)

## Sexually Transmitted Infections (STIs)

In certain circumstances, doctors are required to notify NSW Health if a person is carrying an infectious disease, including but not limited to HIV/AIDS, syphilis, gonorrhoea, chlamydia and hepatitis. Otherwise health workers should approach STIs in the same way as other health issues.

If a person knows they are carrying an STI they must inform their sexual partner of their condition before engaging in sexual intercourse (*Public Health Act 1991 s13*). In the case of STIs (other than HIV/AIDS), a health worker may disclose the infectious status of a client to their sexual partner or other contact if they believe, on reasonable grounds, that it would prevent a serious and imminent threat to the health of the contact.

**Note:** There are stricter privacy laws that apply to HIV/AIDS (*see Disclosure of HIV/AIDS*).

# Sexual Health

## Sexuality

When working with young people who are same sex attracted (SSA), or who identify as gay, lesbian or bisexual, and with people who are transgender, an important access and equity obligation, is to take the necessary measures to ensure these individuals feel comfortable accessing your service. As with all young people, a worker should reassure them about issues of confidentiality and offer them information/education on safer sex practices and, if appropriate, counselling or referral to counselling.

It is important to be aware of the possible additional barriers to accessing health services for young people who may identify as SSA and for people who are transgender. Research highlights that SSA adolescents are a group who may be particularly at risk of isolation, depression, suicide, substance abuse and injury through violence. Furthermore, many SSA young people feel particularly vulnerable when accessing health care as they may believe that health workers assume everyone is heterosexual<sup>2</sup>.

# Alcohol and Other Drugs

## Alcohol and Tobacco

Possession or consumption of alcohol by a person aged under 18 years in a public place, without adult supervision or reasonable excuse, may incur a penalty of \$20 for the young person (*Summary Offences Act 1988 s11*). Supplying alcohol to a person aged under 18 years, without the permission of a parent or caregiver, may incur a maximum penalty of \$5500 or 12 months imprisonment for the supplier (*Liquor Act 1982 s114*).

Possession and consumption of tobacco by people aged under 18 years is not illegal, even though police may seize the products. Selling tobacco products to a person aged under 18 years may incur a penalty of \$5500 for the seller (*Public Health Act 1991 s50*). It is also an offence to purchase tobacco products on behalf of a person aged under 18 years and may incur a penalty of \$2200 (*Public Health Act 1991 s58A*).

A health worker is not required to report a young person aged under 18 years for possession or consumption of alcohol or tobacco. Nor is a health worker legally required to confiscate the products. It is not an offence for a young person to be in possession of alcohol or tobacco whilst visiting a health service. However, it is important to be aware of **your** health service's policies when it comes to alcohol and tobacco. Some services policies may require you to ask the young person to leave or voluntarily give up the substance, if they wish to participate in the activities of the service.

## Other Drugs

### Injecting Drug Use

It is an offence to self-administer an illicit drug (*Drug Misuse and Trafficking Act 1985 s12*) and an individual may be prosecuted for using in an area that is not classified as a medically supervised injecting centre under the *Drug Misuse and Trafficking Act 1985 Part 2A* (at present there is only one in NSW at Kings Cross).

However, NSW Police has developed guidelines to encourage police officers to exercise their discretion to not charge individuals present at drug overdoses, or who have overdosed, for minor drug matters. This is designed to remove any reluctance by individuals to call an ambulance, which could be caused by fear of police prosecution. For further information visit the NSW Police website at - [www.police.nsw.gov.au/community\\_issues/drugs/nsw\\_police\\_initiatives](http://www.police.nsw.gov.au/community_issues/drugs/nsw_police_initiatives).

It is not an offence to possess a syringe (*Drug Misuse and Trafficking Act 1985 s11*). However, possession of injecting equipment may make an individual vulnerable to police attention and equipment with traces of illicit drugs can be used as evidence for charging the possessor<sup>1</sup>. NSW Health notes that sterile injecting equipment should be made available to any person, of any age, who is currently involved in injecting drugs (*NSW Health Frontline Procedures for the Protection of Children 2000*). This equipment can only be distributed by authorised needle syringe programs. A health worker must check that their service is authorised to distribute injecting equipment before they hand it out. If your service is not authorised refer the young person to a service that is. A service may apply to the NSW Department of Health for an authorisation.

# Alcohol and Other Drugs

## Provision of Health Information on Illicit Drug Use

It is not illegal to distribute health information about illicit drug use, provided the final decision to use the illicit drug rests with the young person. NSW Health recommends that information on safer drug use be made available to people of any age<sup>1</sup>. Information published by NSW Health on illicit drug use can be found at the Department's website - [www.health.nsw.gov.au/public-health/dpb/publications.htm](http://www.health.nsw.gov.au/public-health/dpb/publications.htm)

## Issues to Consider

### Reporting Young People for Use or Supply of an Illicit Drug

Drug use and possession of drugs for personal use are not offences that require a health worker to make a report to the police. However, if a health worker is aware that an individual is supplying illicit drugs they may be required to report the offence to the police as this is considered a serious criminal offence (*see Confidentiality*). Circumstances in which reporting may not be required include where knowledge of a possible offence is indirect (for example second hand), where there are other reasonable grounds to question that the offence has definitely occurred, or where the health worker is of the view that the need to maintain client confidentiality outweighs the public interest in having the client prosecuted. NSW Health recommends that a worker who thinks they have reasonable grounds for not reporting should seek legal advice<sup>1</sup>.

### Young People Carrying Illicit Drugs

*What is a health worker to do if they discover a young person is in possession of an illicit drug on the premises of their health service? Or that an illicit drug has been left behind at a health service? Or if a health worker takes a group of young people away on a camp and discovers that a young person is in possession of an illicit drug?*

These are tricky situations. A worker is entitled to ask the young person to leave but they have no legal right to take the illicit drug off the young person. Furthermore, a worker could be charged with possession of an illicit drug if they take control of that drug. It is important that your health service has clear policies about what to do in these situations and that clients of the health service are made aware, to the extent appropriate, of relevant policies (for example a sign may state, 'Persons in possession of illicit drugs will be asked to leave').

If it is necessary to confiscate an illicit drug make sure you tell your manager or a work colleague and make a record of the occurrence in a diary or logbook. It may also be useful to place a note with the illicit drug explaining the situation surrounding it being confiscated, until the drug can be appropriately disposed of. For information regarding the disposal of a confiscated illicit drug, contact your management or local Area Health Service.

## Relevant Laws, Regulations and Policies

*Children and Young Persons (Care and Protection) Act 1998 (NSW)*

*Crimes Act 1900 (NSW)*

*Drug Misuse and Trafficking Act 1985 (NSW)*

*Freedom of Information Act 1989 (NSW)*

*Guardianship Act 1987 (NSW)*

*Health Records and Information Privacy Act 2002 (NSW)*

*Liquor Act 1982 (NSW)*

*Mental Health Act 1990 (NSW)*

*Minors (Property and Contracts) Act 1970 (NSW)*

*NSW Health Department Privacy Manual (Version 1) 2004*

*NSW Health Department Circular 2002/84 'Management of people with HIV infection who risk infecting others'*

*NSW Health Frontline Procedures for the Protection of Children and Young People 2000*

*NSW Health Department Circular 1998/100 'HIV confidentiality: a guide to legal requirements'*

*NSW Interagency Guidelines for Child Protection Intervention 2000*

*NSW Premier's Department Freedom of Information Procedure Manual 1994*

*Privacy Act 1988 (Cth)*

*Privacy and Personal Information Protection Act 1998 (NSW)*

*Public Health Act 1991 (NSW)*

*Summary Offences Act 1988 (NSW)*

## References

1. Cameron, S. and Godwin, J. (1999), *HIV and AIDS: Youth Work and the Law*, NSW Health Department, p 15, 17, 30-31, 33-34, 36-37.
2. Chown, P., Kang, M., Bennett, D.L. and Sanci, L. (2004), *Adolescent Health: A Resource Kit for GPs*, NSW Centre for the Advancement of Adolescent Health and Transcultural Mental Health Centre, Sydney, p 47, 51, 54, 55, 68-69.  
Online at <http://www.caah.chw.edu.au/resources/#03>
3. Department of Health and Community Services [NT] v JWB [Marion's Case] [1992] 175 CLR 218
4. Guardianship Tribunal (2004), *Guardianship Tribunal Publications: Substitute Consent*, at [http://www.gt.nsw.gov.au/information/doc\\_14\\_substitute\\_consent.htm](http://www.gt.nsw.gov.au/information/doc_14_substitute_consent.htm).
5. Lawrence, A., Smith, V. and Williams, S. (1998), *Sexuality and the Law: A Guide for Health and Community Workers in NSW*, Family Planning NSW, Ashfield, p 48-51.
6. NSW Law Reform Commission (2004), *Issue Paper 24: Minors' Consent to Medical Treatment*, at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip24toc> , Sections 2.8, 5.2 and 5.3.
7. The Shopfront Youth Legal Centre (2002), *Confidentiality and Privacy for Youth Workers*, at <http://www.theshopfront.org/documents/ConfidentialityPrivacy.pdf> , p 1-9.



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for Health Workers**

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