



Subpoenas

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Summary The purpose of this policy is to outline how to identify and deal with suspicious mail and packages.

Applies to **All Ambulance Service of NSW staff**

All Operational Staff

All Administration staff

All Headquarters staff

Division staff (select Aero medical, Northern, Southern, Sydney, Western)

Operations Centres (select All, Aero medical, Northern, Southern, Sydney, Western)

Review date 1 December 2008

Previous reference SOPP 6.19 (Subpoenas)

Status Active

Approved by Chief Executive

Compliance with this policy directive is **mandatory**.



SUBPOENAS

The following information is adapted from the NSW Health Policy directive PD2005_405.

The Ambulance Service of NSW policy titled Attendance at Court should also be read with this document. The Mail and Records Unit, State Headquarters can provide further guidance, if your question is not covered in this policy. Alternatively, Professional Standards and Conduct Unit (PSCU) State Headquarters can be contacted.

INTRODUCTION

A subpoena is an order from a court, which directs someone that they must on a certain given date to:

1. Produce to a court certain existing documents for use in legal proceedings;
2. Attend a court on a particular date to be a witness in a hearing and give evidence; or
3. Do both

A subpoena can only be issued if legal proceedings have been commenced. A subpoena can not be ignored and must be dealt with promptly. Failure to comply with a subpoena is a serious matter. It can result in arrest or being charged with contempt of court (failure to comply with a court order). All subpoenas should be brought to the attention of a Sector Office, Divisional Office or State Headquarters.

SUBPOENAS TO PRODUCE DOCUMENTS

The following are preliminary issues to consider when you receive a subpoena.

1. Who is the subpoena addressed to?

For a subpoena to be valid it must sufficiently identify the party in possession of the documents that have been subpoenaed. If a subpoena is defective in this regard the issuing party should be notified in writing immediately and any conduct money paid returned. The letter should explain how the subpoena is defective and a copy of the letter sent to the Clerk or Registrar of the Court.

2. What if the Ambulance Service is party to the proceedings?

If the subpoena lists the Ambulance Service as a party to the proceedings the subpoena should be referred to the solicitor who is acting for the Service.

3. What if the subpoena relates to a coronial inquest?

If the subpoena relates to a coronial inquest, the subpoena should be referred to the Professional Standards and Conduct Unit.



4. Has the subpoena been validly issued?

In most matters, a court must issue a subpoena. This means that they should include a court stamp or signature of a court officer. In some Local Court proceedings, Police Officers and Public Officers can issue subpoenas. These subpoenas do not need to be stamped. If you are uncertain about whether a subpoena has been validly issued, contact the court in which the proceedings have been commenced and ask for confirmation.

5. What are the proceedings about?

From reading the subpoena you will be able to ascertain whether it is a civil or criminal matter and the identities of the parties. In criminal matters, one of the parties will usually be the Director of Public Prosecutions (DPP) or 'Regina' or 'R'. As well as stating the names of the parties, subpoenas should state what court and sometimes what division of court the matter is to be heard in. This may help ascertain what the proceedings are about.

6. Has the subpoena been served in time?

The subpoena should be served in sufficient time to allow the collection of documents and delivery to court. If the subpoena is served after the due date then it does not need to be complied with. The due date will not be less than five days prior to the return date unless the court that issued the subpoena has shortened the time for serving it. If the court has made an order to shorten the period in which you must comply, the subpoena will be marked accordingly.

If the subpoena is served after the due date and there is no note or endorsement on the subpoena from the court stating that the time for service has been shortened, then the subpoena need not be complied with. If the subpoena is not to be complied with, the Clerk or Registrar of the Court should be contacted and advised in writing that the subpoena will not be complied with and reasons given. The issuing party should also be informed. The issuing party may then obtain a further return date (an adjournment) so as to allow sufficient time for the documents to be collated.

Where the subpoena has been served in time, it may be possible to negotiate an extension of time in which to produce the documents with the issuing party.

7. Does it make any difference if the subpoena is a facsimile or a photocopy?

As a general rule the original subpoena should be served to ensure it is authentic. If a photocopy is served or service is by facsimile, the documents can be prepared for dispatch but they should not be sent until the original subpoena has been sighted. This issuing party should be contacted and informed of this. The issuing party should also be informed that it is NSW Health policy not to accept service by facsimile due to legal obligations to protect patient privacy and confidentiality. Insisting on the service of an original subpoena will protect the Ambulance Service from claims by patients that their privacy and confidentiality has been breached by the production of documents without a valid subpoena.

The only circumstance where a faxed subpoena must be complied with is where the court that issued the subpoena has made orders to the effect that the subpoena may be served by facsimile. A copy of the order should accompany the subpoena. If you receive a subpoena and an order for service by fax, you should comply with the subpoena as if it had been served normally.

Sometimes a subpoena will be served by fax without a court order for service by fax. This may be done to provide the Service with advance notice that a subpoena will be served. However, the subpoena may only be served by fax only.



Under new harmonised civil procedure rules, subpoenas must be served personally. However, rule 6 (3) states that a subpoena must be complied with, even if it has not been served personally, if by the last date for service, there is knowledge that the subpoena exists. If the Service has received a copy of a subpoena by fax, it will be assumed that it has actual knowledge of the subpoena and its requirements. This means that if a subpoena is served by fax before the last date for service (in most courts) and you are aware of it and its requirements, you must comply with it.

In criminal proceedings, the Crown is exempt from the requirement of personal service.

8. What is the date the subpoena must be complied with?

As failure to comply with a subpoena is a serious matter, the return date of each subpoena served should be carefully noted as soon as it is received. Where the subpoena offers the choice of sending papers to the court, rather than attending, all papers are often required to be sent 24-48 hours before the return date. If this requirement applies, it should be stated on the subpoena.

It is possible to negotiate an extension of time within which to produce the documents with the solicitor or person who issued the subpoena. This should be done prior to the original return date.

9. What if the subpoena has been issued in a Local Court Criminal Matter or Children's Care Proceedings?

Police Officers and Public Officers now have the power to issue subpoenas in the following types of Local Court proceedings:

- ◆ Local Court criminal summary and committal hearings
- ◆ Local Court Application Notice proceedings
- ◆ Children's Court criminal proceedings
- ◆ Children's Care proceedings and
- ◆ Apprehended Violence Proceedings

A public officer is defined in Section 3 (1) of the Criminal Procedure Act 1986. It includes the following persons acting in an official capacity:

- ◆ An employee of the Public Service (eg this could be an employee of DOCS if the proceedings are children's care proceedings or a member of the NSW Police Service)
- ◆ An officer or employee or a statutory body representing the Crown
- ◆ An employee of a NSW Local Council
- ◆ An officer or employee of a rural lands protection board within the meaning the Rural Lands Protection Act 1998
- ◆ The Director of Public Prosecutions, Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions.

Subpoenas issued by police officers or public officers will not have been signed and dated by a registrar of the Local Court. They will not have a court stamp. They are still valid subpoenas and should be complied with. Other parties to the types of proceedings listed above must still have subpoenas issued by the court registry.

Except where the Court otherwise makes an Order, it is not necessary for a prosecutor / applicant who is a police officer or public officer to tender conduct money to a witness at the time of service of the subpoena.

Any other party who issues and serves a subpoena on a party is required by section 224 of the Criminal Procedure Act 1986 to tender conduct money at the time of service for the reasonable expenses of the person in complying with the subpoena.



10. What if an interstate court issued the subpoena?

The Commonwealth Service and Execution of Process Act allows interstate subpoenas to be validly served in NSW. The general rule is that subpoenas served interstate should be served 14 days prior to the return date. This time can be shortened by the Court that issues the subpoena, if a shorter time period is necessary in the interests of justice and there will be enough time for the subpoenaed party to comply without serious hardship or inconvenience. The Service is entitled to request that the original subpoena rather than a faxed copy will be served. The usual amount of conduct money should also be paid.

CONDUCT MONEY

11. What is conduct money?

When a subpoena is served on a person or corporation, the person named is not required to attend or produce any document or thing under the subpoena unless conduct money is paid. This means “an amount sufficient to meet the reasonable expenses” of the person named is paid or tendered at the time of service.

The court, in the event of a dispute, will determine what ‘reasonable’ conduct money is. In reaching a decision, the court would take into account NSW Health policy when determining what is reasonable. If original documents are produced to court, a photocopying charge will still apply; this covers the cost of copying the records so that the Service can maintain a copy whilst the originals are removed. If a subpoena asks for records relating to more than one patient, the Service can charge separate fees for each patient.

Payment should generally be sought in advance. If this is not possible, tax invoices can be rendered after documents have been produced. It should be noted that subpoenas issued by Police Officers and Public Officers as defined in Question 9 do not need to pay conduct money. Please refer to the Schedule of fees for procurement of medical records for the current fee. NSW Health PD2005_235 “Charges for Health Records and Medical Reports” provides guidance on when a charge should be raised.

12. What if the conduct money is inadequate?

If the conduct money provided does not comply with the Services guidelines then:

- ◆ Call the issuing party to inform him or her of the Service’s requirements
- ◆ If there is still a refusal to provide conduct money, or it is considered insufficient, contact the issuing party and attempt to negotiate some compromise on the amount
- ◆ If a compromise cannot be reached, the subpoena need not be complied with. If the subpoena is not be complied with because of inadequate conduct money a letter should be sent to the court (and copied to the issuing party) stating this and reasons given.

It should be noted that failure to comply with a subpoena because of inadequate conduct money will probably only delay the time by which you have to comply.



13. What if too much conduct money has been provided?

The Service is entitled to retain the minimum amount of conduct money. If more than the minimum amount is provided and the cost of producing the records is less than the amount provided, the records should be copied and delivered to the court and the excess conduct money should be refunded to the issuing party.

14. Are there any special procedures with respect to conduct money if the subpoena involves a lot of work?

If the record is lengthy, or it will require a number of files to be searched or otherwise take up staff time so that it will cost more than the amount provided to produce the record, the issuing party should be contacted and advised of the estimated cost of compliance including staff time in searching and locating the relevant records, photocopy costs and mail or courier fees. Such contact may be by telephone but should be confirmed in writing. On receipt of a cheque for the estimated expenses, the records should be produced.

In the event that the actual costs exceed the estimate, a further account should be raised against the issuing party. If compliance with a subpoena involves a significant amount of work, consideration should be given to discussing with the issuing party whether they are prepared to narrow the scope of the subpoena.

15. Can the Service keep the conduct money if it has no documents to produce?

If the Service receives a subpoena, conducts searches for the records requested, and has no records to produce, the conduct money can be retained to cover the cost of conducting the searches, and the cost of writing to the court explaining that there is no record to produce.

If the records have been lost, misplaced or destroyed, then the court should be advised that there is no record to produce and the conduct money should be refunded.

16. WHAT DOCUMENTS HAVE BEEN REQUESTED IN THE SUBPOENA?

17. How do I determine the scope of the subpoena?

The subpoena must be read very carefully to ascertain its breadth. This is critical because the Service is under an obligation to produce **only** those documents covered by the description set out in the subpoena. A subpoena may call for the production of health and/or non-health related records. The applicable procedures are the same.

The next task is to undertake appropriate inquiries to determine whether the Service is in possession of any records which fall within the scope of the subpoena, the likely location of the records and the number of files that may have to be searched. These records could be located in medical records, on a personal or administration files. A thorough search needs to be conducted to ensure all relevant records are found and produced.

Where files are located containing documents which fall within the scope of the subpoena, care should be taken to ensure that only those documents which fall within the subpoena are collated for the purposes of copying and production.

Documents that do not come within the scope of the subpoena should be removed from the file before it is copied and documents sent to court. A clear record of which documents have and have not been produced and a copy of the subpoena should be kept by the Service. This may involve keeping an additional copy of the records that were sent to Court, if the records that were sent are a small extract from the file.



If the subpoena requests “any records” or “all records”, this includes the entire file relating to the patient or the subject matter of the subpoena. Records could be stored separately, in different record keeping systems, for example, email, payroll system or voice recordings.

18. What if the subpoena captures notification to the Department of Community Services (DOCS)?

Pursuant to the Children and Young Persons (Care and Protection Act) 1998, if a person makes a report to DOCS in relation to a child or young person, the report, or evidence of its contents, is not admissible in any proceedings (other than care proceedings in the Children’s Court), or appeals arising from care proceedings. In addition, a person cannot be compelled in any proceedings to produce the report or a copy of or extract from it or disclose or give evidence of any of its contents.

This means that reports should not be produced in answer to a subpoena unless the subpoena has been issued in care proceedings. This applies to reports made to DOCS pursuant to sections 24, 25, 27 and 122 of the Children and Young Persons Care and Protection Act.

If the subpoena has been issued in care proceedings, the report can be produced. However the name of the person who made the report, and any information which would lead to the identification of the person who made the report should not be produced. This is unless the person who made the report consents or the court grants leave for the identity of the person who made the report to be disclosed. Information other than reports to DOCS should be dealt with as “sensitive information”.

19. What if the subpoena captures sensitive records?

For medical records, the prime criterion of sensitivity is whether the patient would consider the data sensitive. Examples include: sexual assault, drug and alcohol, HIV/AIDS, domestic violence, genetic information, transgender status, mental health and records of children considered to be at risk and records containing information on other persons. Records relating to people or patients who are not directly involved in the legal proceedings can also be classified as sensitive. Examples include where genetic counselling or medical records contain information relating to persons other than the patient

The fact that records are sensitive does not itself mean that privilege can be claimed over them, or that they do not need to be produced. If a subpoena requests sensitive records and there are no grounds for challenging the subpoena or claiming privilege, the procedure set out in Question 30 may be followed.

20. What if there are no documents?

If there are no records, a letter should be written to the court advising the court that there are no records to be produced. This letter should be copied to the issuing party. The conduct money may be retained. However, if there are records but there is evidence that there were relevant records that have been lost, misplaced or destroyed, then the court should be advised that there are no records to be produced and the conduct money should be refunded.

A file note should be created outlining efforts made to find the relevant records. If the records were destroyed in accordance with a disposal authority approved under the State Records Act 1998, a copy of the disposal authorisation should be included and the relevant disposal category cited.



ON WHAT GROUNDS CAN A SUBPOENA BE CHALLENGED?

21. The subpoena is too wide and/or oppressive

A subpoena may be set aside:

- ◆ Where its terms are so wide and insufficiently precise that compliance (ie collation and production of documents) would impose an onerous obligation on the Service; or
- ◆ Where a subpoena is used for the purpose of 'fishing' for information that a party hopes, but does not reasonably expect is in existence. This may apply particularly to broad requests for protocols and investigation documents.

Subpoenas which request the production of medical records relating to persons who are not parties to the proceedings, or which request records relating to multiple, unrelated patients may be an abuse of process or oppressive. The subpoena may also be oppressive if it is not clear what documents are sought by a subpoena, or if it appears that the documents sought will have little or no relevance to issues in the proceedings.

The scope of a subpoena can be narrowed in two ways:

- ◆ By agreement with the issuing party; and
- ◆ By successfully challenging the subpoena in court

If you believe that the scope of the subpoena is too broad and calls for documents to be produced which are demonstrably not relevant to the proceedings, an option available is to approach the issuing party, with a view to seeking a compromise on the range of documents that are required. If a compromise is reached, written confirmation should be obtained from the issuing party. If the issuing party refuses to negotiate the scope of the subpoena as is suggested and the Service can still challenge the subpoena on the basis that it is an abuse of process or oppressive.

Contact the Records and Mail Services Unit (Ph: 9320.7725) for guidance of whether legal advice should be sought. If a subpoena is challenged unsuccessfully the Service may be liable to pay court costs (associated with argument over the subpoena) of the party who issued the subpoena.

22. The subpoena is an abuse of process or lacks a legitimate forensic purpose

A subpoena that has been issued for reasons other than for the purpose of obtaining relevant evidence for the proceedings may be set aside. In criminal matters, an accused person must have an objective basis for demonstrating a real possibility that the subpoenaed material would assist his or her defence. Only documents that have a legitimate forensic purpose need to be produced. Legal advice is recommended in order to argue that records have no legitimate forensic purpose.

23. Public interest immunity

Where the public interest that would be served by withholding certain documents is so strong that it overrides the public interest in the following of due process, a subpoena may be set aside. A challenge on this basis applies only to very limited types of documents and will usually only be available to documents, which may affect national security, the workings of the NSW Cabinet or some other extraordinary public interest. If you wish to challenge a subpoena on a public interest immunity basis, the NSW Health Legal Branch should be contacted.



24. Client legal privilege

Client legal privilege can protect certain documents from being disclosed in court proceedings. This privilege applies to confidential communications between a client and another person, or between a lawyer acting for the client and another person, if the communication was for the dominant purpose of the client being provided with professional legal services relating to a court proceedings or an anticipated or pending court proceedings in which the client is or may be, or was or might have been, a party.

If a claim for legal professional privilege is contested, evidence will be required from the author of the documents and/or the person who requested that the document be created, that it meets this test; and/or other investigations will need to be undertaken as to the document's dominant purpose. If the Service wishes to claim client legal privilege over its documents it has created for legal proceedings, the lawyer that the Service instructs in those proceedings will be responsible for claiming the privilege.

25. Qualified privilege

NSW qualified privilege legislation (Division 6B of the Health Administration Act) applies to approved quality assurance committees. It operates to prevent committee members and documents produced by the committee from being used in any legal proceedings.

Qualified privilege applies to records that are under the control of an approved assurance committee, or a member of an approved quality assurance committee and were created at the requests of or solely for the purpose of the committee. If documents created by an approved quality assurance committee but have been disclosed to other units of the Service, the privilege may be waived, however, if the committee has not waived privilege over the documents, the Service should write to the party who issued the subpoena and to the court stating that the records are protected by qualified privilege and will not be produced.

There are currently approximately 60 of these committees in operation in NSW. If records relating to quality assurance activities and morbidity and mortality case reviews or committees are requested, the Service Executive should be contacted to confirm whether the records are records created by an approved quality assurance committee.

In addition to approved quality assurance committees, the Minister has approved the following committees under Section 23 of the Health Administration Act 1982, to be specially approved committees.

- ◆ Special Committee Investigating Deaths under Anesthesia
- ◆ Special Committee Investigating Deaths Associated with Surgery
- ◆ Maternal and Perinatal Committee
- ◆ Mental Health Sentinel Events Review Committee

These committees do not need to comply with subpoenas. If one of these committees is subpoenaed, it should not comply with the subpoena unless it has the approval of the Minister to do so, or the consent of the person from who the information was obtained. A letter should be sent to the solicitor issuing the subpoena explaining the committee's special status and stating that records will not be produced.



26. Sexual Assault Communications Privilege

Records relating to the counselling of victims of sexual assault (protected confidences) may be protected from production if they are covered by sexual assault communications privilege. Sexual assault communications privilege can be claimed in criminal proceedings, including proceedings relating to Apprehended Violence Orders (AVOs). The sexual assault communications privilege can also be claimed in NSW civil proceedings, in limited circumstances. The privilege cannot be claimed in federal courts, such as the Family Court.

The Service has an obligation to patients to take steps to protect confidential sexual assault counselling communications from being disclosed where disclosure would harm the patient.

27. Professional Confidential Relationship Privilege

This privilege may apply to a communication made by a person, in confidence, to another person in the course of a relationship in which the confidant was acting in a professional capacity and where the confidant was under an express or implied obligation not to disclose the contents of the communication. The privilege can only be claimed in NSW courts. The privilege cannot be claimed in federal courts, such as the Family Court.

A protected confidence may include a communication between a health professional and a patient. The definition potentially covers many aspects of clinical records.

PROCEDURES FOR RESPONDING TO A SUBPOENA

28. Should I notify anyone of the subpoena?

The type of documents required will determine who should be notified and manage the subpoena:

- ◆ Patient Health Care Records - Medical Records, Northern Division
- ◆ Documents for the Coroners Court – PSCU, State Headquarters
- ◆ Documents for any public liability claim – Risk Management, State Headquarters
- ◆ Documents related to workers compensation – Risk Management, State Headquarters
- ◆ Documents for personnel information – Human Resources Unit and Payroll, State Headquarters

Where a patient whose health record has been subpoenaed is not named on the subpoena as a party to the proceedings before the court, he or she should be notified by the Service that the subpoena has been received and advised of the return date on the subpoena in sufficient time to allow the patient to arrange to attend court if the patient wishes. Telephoning the patient, or writing to the patient's last known address is sufficient. A note should be made outlining measures taken to advise the patient of the subpoena.

29. Are photocopies sufficient or must originals be produced?

Usually photocopies of records are sufficient. Copies should be supplied in the first instance. If the issuing party later insists on the original records, these must be produced. If the Service is required to produce originals, a complete copy of the record should remain with the Service to ensure continuity of care.



30. What is the procedure for delivering subpoenaed documents to the court?

Documents produced under NSW subpoenas must be produced to the court at the address referred to in the subpoena and not to the issuing party. They should not be provided to the person who serves the subpoena, even if the matter is 'urgent'.

Documents produced on subpoena should be delivered to the Registrar or Clerk of the court in question. They should be:

- ◆ Sealed in an envelope (if sent by Express Post the number should be noted)
- ◆ A copy of the subpoena should be secured inside the envelope
- ◆ The Service should keep a copy of the subpoena (and any original documents being sent to court with the subpoena)
- ◆ The envelope should be sent by post or courier by 4pm on the working day before the return date. (Some subpoenas specify that the documents must be received two days prior to the return date)

On delivery, if practicable, a receipt should be obtained from the court which indicates the number of the record, the date the record was received at the court, the name of the court and the signature of the court official receiving the record.

If the Service is a party to the proceedings in which the subpoena has been issued, or has sought legal advice in relation to the subpoena, the documents collated in response to the subpoena should be forwarded to the solicitor who is acting on behalf the Service. That solicitor will review the documents and arrange for them to be forwarded to the court on behalf of the Service.

31. Can any additional precautions be taken for sensitive records?

A subpoena cannot be challenged merely because it requests sensitive records. When responding to a subpoena that requests sensitive information (and where there are no grounds for challenging the subpoena or claiming privilege over the documents) the following steps should be followed:

- ◆ Contact the issuing party and ascertain why the information is required. It may be possible to negotiate with the issuing party to either exclude these records from production, or produce copies of the records with the names of the affected people deleted.
- ◆ Request that the court limit access to the documents to certain people. For example, courts can give orders limiting access to the parties' legal representatives and independent experts on the condition that they give confidentiality undertakings. The responsibility for raising this issue rests with the subpoenaed party. A letter should be sent to the court setting out the concerns arising if the documents are provided in open court. The letter should not contain any sensitive information itself.
- ◆ If sensitive records are to be produced, they could be placed in a separate envelope marked "sensitive", however, this is no guarantee that the Court will treat these records differently.



PROCEDURES FOR CHALLENGING A SUBPOENA IN COURT

32. Subpoenas for records that are privileged (other than sexual assault and confidential communications privilege)

A solicitor's assistance will be necessary depending on the complexity of the case. If the Service decides to challenge a subpoena without legal representation the following procedures will apply:

- ◆ Place the records which are to be produced in a sealed envelope
- ◆ Place any records over which a claim for privilege will be made in a separate envelope and mark the word "privileged" on the envelope.
- ◆ Staple or tape a copy of the subpoena to each envelope
- ◆ Send the envelope(s) marked "privileged" to court with a letter to the registrar setting out:
 - ◆ What type of privilege is claimed; and
 - ◆ The reasons supporting the claim for privilege
- ◆ Consider attending in person on the return date, or instructing the Service's solicitor to attend, in order to argue in support of the claim for privilege

See NSW Health Department PD2005_405 for further information on managing subpoenas for sexual assault records or other confidential records.

WHAT HAPPENS AFTER THE DOCUMENTS HAVE BEEN PRODUCED?

33. Who can see the documents after they have been produced to the court?

After documents have been produced to court, the court will make orders about who may access them. Usually the parties to the proceedings and their legal representatives will be granted access to the documents. If a patient's medical record has been produced to court, and the patient is also a party to the proceedings, his or her legal representative may ask for 'first access'. This means that the patient's legal representative can inspect the records before the other parties, in order to determine whether a privilege claim can be made to limit further access to the documents.

The question of who may have access, whether a party will have first access, or whether any other special access orders will be made, is often determined on the return date. The following courts determine access issues in particular ways.

◆ **District Court – Civil claims**

The issuing party in a District Court civil matter is required to include a 'proposed access order' on the subpoena. This is an order for access that the issuing party thinks is appropriate. Eg. The proposed access order may be "plaintiff to have first access to the documents for 7 days". This type of access order may be appropriate if the plaintiff was the patient whose records had been produced, as it would allow the plaintiff / patient's solicitor to view the records and determine whether any claims for privilege should be made, prior to the other parties accessing the records.

If the Service wishes to object to the proposed access order (eg. if a privilege is being claimed), the Service should first notify the issuing party to attempt to negotiate an agreement as to what the proposed access order should be. If an agreement can not be reached, a representative of the Service, or the Service's legal representative will be required to appear at Court on the return date and argue the question before the presiding registrar. In any District Court civil case where there is no appearance at the return date, the proposed access order will be made automatically by default.



♦ Supreme Court

If a general access order allowing all parties access to the subpoenaed documents at the same time is not objected to, the Supreme Court will automatically make a default order for general access to the documents at the return date.

If the Service wishes to object to a general access order being made, it should notify the party that issued the subpoena and attend court, or arrange for a lawyer to attend court, on the return date and inform the Registrar of its position.

34. What if I receive a request for permission to ‘uplift’ documents?

Courts have photocopying facilities available on site; however, occasionally parties to litigation seek permission from the court to uplift, or temporarily remove the documents from the court to arrange for them to be copied externally, or reviewed in a more convenient setting. The documents are then returned to the court.

As the documents still belong to the subpoenaed party while they are at the court, some courts seek the consent of the subpoenaed party before they will allow the documents to be uplifted. If the Service is asked to consent to a party uplifting records, it is recommended that:

- ♦ If original documents have been produced, consent to uplift should generally be refused;
- ♦ If copies have been produced, consent can be granted on the basis that the documents do not leave the custody of the parties’ legal representatives and are returned to the court in the same condition.

If a court allows documents to be uplifted, it will normally require the legal representative uplifting them to sign a receipt, accepting responsibility for the records whilst they are in the legal representative’s possession.

35. Are subpoenaed documents returned?

Original documents should always be returned to the Service. Subpoenaed documents that are copies should be returned by the court at the conclusion of the matter, unless the Service has informed the court that the documents may be shredded. If you have any queries contact the Clerk or Registrar of the court.

REQUESTS FOR INFORMATION FROM THE DEPARTMENT OF COMMUNITY SERVICES

Pursuant to Section 248 of the Children & Young Persons (Care and Protection) Act, the Service may be required to provide information to DOCS. Section 248 requests are not subpoenas, however they are a further way in which records may be requested.

Information can only be provided in response to a Section 248 request if it relates to the safety, welfare and well being of a particular child or young person. Once records have been provided to DOCS in answer to a Section 248 request, DOCS may use them as evidence in legal proceedings. If records are to be used in legal proceedings, they are usually annexed to an affidavit (sworn statement) prepared by DOCS staff in accordance with arrangements agreed upon between NSW Health and DOCS. DOCS staff are not to attach confidential information provided in response to a Section 248 requests to affidavits without the consent of the person who provided the information.



If the document that DOCS wish to attach to their affidavit is particularly sensitive, the Service should refuse to consent (unless the patient's guardian does not object) and ask DOCS to issue a subpoena seeking a copy of the document instead. Once a subpoena has been served, the Service may consider whether production can be opposed, or whether any type of privilege can be claimed in respect of the document.

Information about responding to Section 248 requests can be found in Chapter 9 of the NSW Health Policy: "NSW Health Frontline procedures for the protection of children and young people" and PD2005_299 "Protecting children and young people".

36. Privacy

Compliance with a subpoena is required by law. Complying with a subpoena will not breach the Service's obligations under the Health Records Information Privacy Act 2002. For further information about privacy obligations, see NSW Health Privacy Manual V2, PD2005_593.

SUBPOENAS TO GIVE EVIDENCE

- ◆ A subpoena to give evidence is addressed to a specific individual. It will indicate the time and place the person will be required to give evidence as a witness. Subpoenas should be delivered to the person indicated on the subpoena. However, due to the nature of the hours worked by ambulance officers, Sector Offices, Divisional Offices and State Headquarters will receive subpoenas for officers to give evidence on behalf of the officers. The original subpoena, including the conduct money, will be sent to the Sector Office, who will then forward the subpoena to the ambulance officer. **Only subpoenas relating to Ambulance Service of NSW business will be accepted. Any personal subpoenas will not be received on behalf of an employee.**
- ◆ If an officer does receive a subpoena directly, this should be reported to his/her Station Manager / Manager as soon as practicable. The Sector Office should be then contacted. Sector Office will be able to coordinate coverage of the shift for the expected court date. Sector Office will also arrange to recover any necessary additional costs. Copies should be filed at the Sector Office.
- ◆ A person who has been subpoenaed should contact the solicitor who requested the issue of the subpoena to:
 1. Confirm their attendance is still required
 2. To obtain some better guidance as to when he or she might be required to give evidence; and
 3. Confirm that the solicitors who has issued the subpoena still requires the witness to remain on 'standby' rather than come to Court, sufficient notice will be provided if the witness is to be called to Court so that alternative work arrangements can be made
- ◆ If a solicitor indicates that a person's attendance is not required, this should be confirmed in writing.
- ◆ Witnesses are entitled to receive conduct money and reasonable expenses from the solicitor or person who has issued the subpoena. Conduct money means a sum of money, or its equivalent, such as pre paid travel, sufficient to meet the reasonable expenses incurred by the subpoenaed party in attending court as required by the subpoena, and returning from court after attending. Reasonable expenses may be the cost incurred by the Service in replacing a staff member while they are at court.
- ◆ Ambulance Officers can contact their Sector Office for further information.



- ◆ Sector Offices can contact their Divisional Office or State Headquarters (depending on the subject matter of the subpoena – Records and Mail Services Unit, PSCU or Risk Management) for further advice as required.

COMMON COURTS AND TRIBUNALS

The Family Court of Australia

The Family Court resolves and determines family disputes, including disputes about the care, custody and maintenance of children. The Family Court also provides consent for special medical treatment (such as sterilisation, surgical gender reassignment and the harvest of bone marrow blood cells from a disabled child for transplantation into a relative) to be carried out on minors.

The Supreme Court of New South Wales

The highest court in the State is the Supreme Court of NSW. It has unlimited civil jurisdiction and handles the most serious criminal matters. The Court of Appeal and the Court of Criminal Appeal hears appeals from decisions made by a single judge of the Supreme Court.

District Court

The District Court is the intermediate Court in New South Wales and deals with criminal and civil cases. The District Court has jurisdiction to hear:

- ◆ All indictable criminal offences (except murder, treason and piracy) and;
- ◆ Civil matters with a monetary value up to \$750,000 or greater with the consent of the parties. The Court also has an unlimited jurisdiction in respect of motor accident cases.

The Court can also deal with applications under the De Facto Relationships Act 1984 and the Family Provision Act 1982, which involve property worth up to \$250,000. The Court's judges hear appeals from the Local Court and also preside over a range of administrative and disciplinary tribunals.

Local Courts

The Local Courts are the courts of general access in New South Wales. There are over 160 Local Courts in NSW. They have jurisdiction to deal with:

- ◆ The vast majority of criminal and summary prosecutions
- ◆ Civil matters with a monetary value of up to \$60,000
- ◆ Committal hearings
- ◆ Family law matters
- ◆ Child care proceedings
- ◆ Juvenile prosecutions and care matters
- ◆ Coronial inquiries

In the Local Court, Magistrates hear criminal cases that do not need judge and jury. These might include summary offences such as traffic matters, minor stealing, offensive behaviour and some types of assault. Magistrates also hear applications for apprehended violence orders where one person is seeking a restraining order against another.

A magistrate conducts committal proceedings to decide if there is enough evidence for a serious matter, such as armed robbery, or attempted murder, to go before the District Court or the Supreme Court. Coroner's Courts investigate deaths and fires, to find out the likely cause of the death or fire. Children's Courts deal with criminal matters involving children who are younger than 18 and with children who are in need of care or protection.



Administrative Appeals Tribunal

The main role of the Administrative Appeals Tribunal is to review administrative decisions of NSW government agencies, including freedom of information decisions. The Tribunal also has original decision-making jurisdiction in:

- ◆ Disciplinary proceedings relating to certain professions;
- ◆ Equal opportunity complaints under the Anti-Discrimination Act 1977; and
- ◆ Retail lease claims

Workers Compensation Commission

The Workers Compensation Commission deals with workers compensation disputes arising out of work related injury or disease suffered by a worker in NSW. In addition, the Commission administers medical panels, which assess a worker's condition or fitness for employment in circumstances specified in legislation.

Coroners Court

Coroners are situated around NSW in Local Courts. They inquire into the circumstance surrounding deaths that are reported to them. The State Coroner's role is to ensure that all deaths, fires and explosions which are under the Coroner's jurisdiction are properly investigated and concluded, and where the law requires an inquest to be held, or in cases where the Coroner believes an inquest is necessary, a full inquest is undertaken

Drug Court

The Local or District Court in the defined catchment area must refer offenders who appear to meet the Drug Court obligatory criteria, to the Drug Court. The Court works in collaboration with a number of other organisations. These include the Department of Corrective Services, including the Probation and Parole Service and the Department of Health.

Dust Diseases Tribunal

The Dust Diseases Tribunal hears and determines claims for dust related diseases suffered as a result of exposure to dust. Dust diseases include mesothelioma, asbestosis, silicosis and certain types of lung cancer. The Dust Diseases Tribunal follows the procedural rules of the Supreme Court of NSW.