How do I use or disclose protected information?

Introduction
Part 7 of the Aged Care Quality and Safety Commission Act 2018 (Quality and Safety Commission Act) outlines how information gathered in connection with the Quality and Safety Commission Act needs to be protected. Section 60(2) defines protected information as information that:

- is acquired under, or for the purposes of, this Act or the rules that:
  (a) is personal information; or
  (b) relates to the affairs of an approved provider or a service provider of a Commonwealth-funded aged care service.

Personal information is defined as information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- whether the information or opinion is true or not; and
- whether the information or opinion is recorded in a material form or not.

All the providers we deal with would be covered under the definition above (including providers receiving a grant such as a CHSP or NATSIFACP), and much of the information we gather will meet the definition of personal information. It is therefore important that complaint officers and managers understand how protected information can be used and shared.

When can protected information be disclosed?
The Quality and Safety Commission Act allows protected information to be disclosed to a person or another body outside of the Commission under the following conditions:

- the disclosure is carried out in the performance of a function or duty under Quality and Safety Commission Act, the Aged Care Quality and Safety Commission Rules 2018 (the Rules) or the Aged Care Act 1997 or Aged Care Principles; or
- the disclosure is authorised by the person or body to whom the information relates; or
- the disclosure is otherwise authorised under the Quality and Safety Commission Act – generally as prescribed in subsection 61(1).
The Quality and Safety Commission Act and the Rules set out the functions or duties complaints officers exercise or carry out when resolving complaints. This means that complaints officers are able to disclose protected information when they are exercising a relevant function. For example, a complaint officer can provide a complainant with information about the actions an approved provider has taken to resolve their complaint without fear that they are inappropriately disclosing protected information. This is because (under most circumstances) the complaints officer would be providing the information whilst carrying out their function either to:

- give a complainant a written notice about a resolution process, or
- engage with a complainant to try and resolve a complaint quickly.

It is important to be familiar with the functions or duties you are exercising – and to understand the wording used to describe them. For example, section 22 of the Rules states that nothing in the Rules prevents the Commission from being able to refer an issue to the department, another person or another body. However, section 22 does not actually describe the Commissioner's ability to make a referral in terms of a power, function or duty. To disclose protected information for a referral, we need to ensure one of the authorisation grounds in subsection 61(1) of the Quality and Safety Commission Act applies.

We are able to disclose protected information to the person it relates to in the complaint – for example, discuss with a provider their response to a service provider resolution referral. Equally, someone who has shared information with us can authorise us to disclose it to another specified person or body. We don’t often rely on this ability, and care needs to be taken that the person understands the extent and the purpose for which the information will be shared.

If you are unsure about whether the Quality and Safety Commission Act or Rules includes a function that allows you to disclose protected information, you should seek advice through the Guidance Portal.

**When is the disclosure of protected information authorised under subsection Section 61?**

Section 61 of the Quality and Safety Commission Act outlines a series of circumstance where the Commissioner is authorised to disclose protected information. The exact wording of the subsection is below.

(1) The Commissioner may disclose protected information:
(a) if the Commissioner determines, in writing, that it is necessary in the public interest to disclose the information in a particular case—to such persons and for such purposes as the Commissioner determines; and

(b) to a person who is, in the opinion of the Commissioner, expressly or impliedly authorised by the person or body to whom the information relates to obtain it; and

(c) to the Secretary to assist in the performance of the functions, or the exercise of the powers, of the Secretary; and

(d) to the Chief Executive Medicare for the purposes of payment of subsidies under the Aged Care Act; and

(e) if the Commissioner believes, on reasonable grounds, that the disclosure is necessary to prevent or lessen a serious risk to the safety, health or well-being of an aged care consumer—to such persons as the Commissioner determines, for the purpose of preventing or lessening the risk; and

(f) if the Commissioner believes, on reasonable grounds, that:
   (i) a person’s conduct breaches the standards of professional conduct of a profession of which the person is a member; and
   (ii) the person should be reported to a body responsible for standards of conduct in the profession;

   to that body, for the purposes of maintaining standards of professional conduct in the profession; and

(g) if a person has temporarily taken over the provision of care through a particular service to aged care consumers—to the person for the purposes of enabling the person to properly provide that care; and

(h) if the Commissioner believes, on reasonable grounds, that disclosure of the information is necessary for:
   (i) the enforcement of the criminal law; or
   (ii) the enforcement of a law imposing a pecuniary penalty; or
   (iii) the protection of the public revenue;

   to an agency whose functions include that enforcement or protection, for the purposes of that enforcement or protection; and

(i) to the Aged Care Pricing Commissioner to assist in the performance of the Aged Care Pricing Commissioner’s functions under the Aged Care Act; and
(j) to a person of a kind specified in the rules, for the purposes specified in the
rules in relation to persons of that kind.

(2) If a determination under paragraph (1)(a) or (e) is made in writing, the determination
is not a legislative instrument.

The Commissioner, or her delegate, does not need to be exercising a function or duty under
the Rules to be able to disclose information under the authority of subsection 61(1). Equally,
when disclosing protected information in the course of carrying out a function or a duty, a
scenario under subsection 61(1) does not have to be met.

Before disclosing protected information under subsection 61(1), the Commissioner, or her
delegate, has to be satisfied that the disclosure meets the grounds described in the relevant
paragraph. For example, to disclose information under sub-paragraph 61(1)(h)(i), the
Commissioner would have to be confident that the disclosure was reasonably necessary for
the enforcement of the criminal law. This means that the Commissioner can't just disclose
protected information to the Police because she thinks that they may be interested in it.
Rather, she needs to believe, on reasonable grounds (a set of facts that would convince an
ordinarily prudent person), that the disclosure is reasonably necessary (fair or proper under
the circumstances) for the Police to enforce the criminal law (take action in relation to a
possible offence under a relevant criminal code).

Whether the circumstances of individual cases meet the grounds described in subsection
61(1) will depend upon the context. It may be that legal advice is required on the
appropriate paragraph to use and whether the circumstances warrant the disclosure. This
can be facilitated through contacting the Guidance Portal.

Who can disclose protected information?
The Commissioner's functions and duties in relation to complaint handling are generally
considered to be delegated decisions or functions. This means that only the Commissioner
or someone, to whom she has delegated the authority, is able to carry out functions which
involve the disclosure of protected information. The situation is the same in relation to the
disclosure of information under subsection 61(1) of the Quality and Safety Commission Act.
The Aged Care Quality and Safety Commission Complaint Guidelines and our Factsheets
also provide additional guidance on who can take certain decisions or exercise certain
functions.

To determine whether you, or one of your managers, have the authority to make certain
decisions or carry out functions, start by referring to the Aged Care Quality and Safety
Commission Instrument of Delegation. In some instances you will then need to also consult
with either the guidelines or your manager to understand any operational instructions on
decision making. For example, under the Instrument of Delegation, an APS 4 officer has
been delegated the ability to end a resolution process under subsection 13(1) of the Rules
and provide feedback to the complainant and provider (a process which is likely to involve the disclosure of protected information). However, the Complaints Commissioner’s operational instructions are that some actions can only be taken by an officer at the EL1 level or above.

**What if I am unsure whether information is protected?**

Much of the information we deal with would meet the definition of protected information. If you are unsure, you should discuss the circumstances with your Manager and/or contact the Guidance Portal for advice.

**How do I record the disclosure?**

It is important to remember that inappropriately disclosing protected information is a criminal offence. In any prosecution, the defendant bears the evidentiary burden. This means that the defendant would need to be able to argue why they were allowed to disclose the information. It is important to remember this and ensure that record keeping is thorough and accurate, so that it can be relied on later to give a clear picture of what information was disclosed and why.

In addition, it is important to ensure that there is a record of the person who either authorised or made the disclosure. This ensures that there is a record that someone with the appropriate delegation or authority disclosed the information.

Generally, when protected information is disclosed in association with carrying out a duty or function under the Rules, there will already be a form of record keeping in place. For example, the information disclosed through feedback letters is recorded in the actual letter, with the authority recorded through the delegate signing the letter. When information is disclosed during a phone call, the record keeping is in the form of a file note, which clearly shows the author and the time and date of the call.

When information is disclosed under subsection 61(1) of the Quality and Safety Commission Act, the appropriate template in NCCIMS should be used. This ensures that a record is made detailing the grounds (or paragraph) under which the information is being disclosed, the basis upon which the disclosing officer was satisfied that the requirements for disclosure were met and the name of the authorising officer (either the Commissioner or her delegate). The information being disclosed should be recorded in correspondence or a file note – and include information on the limitations described in section 62 of the Quality and Safety Commission Act on the use of the information.

**Are there restrictions on how a recipient can use the protected information that has been disclosed to them?**

Section 60 (1) of the Act states:
(1) A person commits an offence if:

(a) the person obtains information in the course of performing functions, or exercising powers, under or for the purposes of this Act or the rules; and
(b) the information is protected information; and
(c) the person:
   (i) makes a record of the information; or
   (ii) uses the information; or
   (iii) discloses the information to another person.

Penalty: Imprisonment for 2 years.

When information is disclosed under section 61, the recipient is restricted to using it only for the purpose described. For example, information could be disclosed to a professional standards body because the Commissioner or her delegate believes that a person’s conduct breaches their standards of professional conduct. The restriction on the recipient would mean that they couldn’t then give the information to the person’s employer.

It is important (as noted above) that the recipient is made aware of the restrictions. Where the information is disclosed in correspondence, information about the restriction should be included. Where the information is disclosed verbally, the restrictions should be discussed and recorded in the relevant file note.

What happens if I incorrectly disclose protected information?
If you become aware that you have disclosed protected information in error, you should speak with your manager immediately. You and your manager should escalate the matter to the relevant director and the Executive Director Complaints Resolution Group. Legal advice can be obtained through the Guidance Portal.

What else do I need to take into account?
When sharing information, it is important to remember that there are other elements that might restrict disclosure beyond the protected information provisions in the Quality and Safety Commission Act.

Defamation: Defamation is the communication of a false statement that harms the reputation of an individual, business or organisation. Sharing information inappropriately could expose the Commission to the risk of defamation action. The context that information is shared in could make its disclosure more or less likely to affect the risk of defamation. For example, sharing information about the referral of a doctor (unnamed) to a professional standards body may be defensible under the protected information provisions. However, in circumstances where the recipient of the information was able to identify the person and they then communicated to others that the doctor had breached his professional standards, the Commission may be exposed to a claim of defamation.
Damage to Reputation: There may be circumstances where releasing information is defensible in relation to the protected information provisions, but it damages the Commission’s reputation. If it is publicly perceived that the Commission is not prudent with how it shares information, this may undermine individuals, providers or organisations confidence in sharing information with us.

Privacy: Where information is disclosed in accordance with the protected information provisions in the Quality and Safety Commission Act, we should also be acting in accordance with the Privacy Act 1998.

Individual expectations: People who engage with us may have expectations about how their information will be handled that are at odds or different from the legal requirements. We should endeavour to understand people’s expectations and actively manage them before releasing protected or other sensitive information that relates to them.

An example might be a caller who says that they are going to self-harm. The officer and their manager may form the view that as the information wasn’t gathered for the purposes of the Quality and Safety Commission Act it isn’t protected information, and that there is a risk to personal safety. They decide to call the Police without telling the caller. The caller however, may not have thought that this was a likely outcome of sharing the information and be very angry. Ideally, before sharing the sensitive information, it is best to try and explain this to the caller and seek their consent. This doesn’t preclude us from contacting the Police if people don’t consent or we can’t contact them again.

Related Factsheets
- Factsheet 57 – What do I need to know about The Privacy Act 1988 and the Australian Privacy Principles
- Factsheet 58 – How do I collect information?
- Factsheet 59 – How do I handle unsolicited information?
- Factsheet 61 - How do I handle suspected or actual data breaches?