

# SUBPOENAS PROCEDURE<sup>®</sup>

## DOCUMENT SUMMARY/KEY POINTS

- The Sydney Children's Hospitals Network (SCHN) regularly receives subpoenas.
- NSW Health Policy Directive [PD2019\\_001 Subpoenas](#) – it is mandatory that SCHN has systems and procedures in place to ensure compliance with subpoenas.
- The SCHN recognises that many staff are familiar with required processes associated with the subject matter of the NSW Health Policy [PD2019\\_001 Subpoenas](#), however formal and standardised processes are required due to the legislative nature of these matters.
- This document sets out the local procedure that should be followed when a request for the production of documents is made by way of a Subpoena, or otherwise, or a member of staff is subpoenaed to give evidence before any Court or Tribunal in NSW, or further afield.
- Support and counselling mechanisms are available for staff members who become involved in legal proceedings and the procedure to do so is set out in this document.
- Follow the section on [Subpoena to produce documents](#) for subpoenas requesting documents.
- When subpoenaed to give evidence, follow the steps outlined in [Receiving a Subpoena to give evidence – next steps](#).
- All requests for **Media Statements** arising from giving evidence under subpoena before any court or tribunal must go to the Director of Community Relations and Marketing for appropriate action, SCHN-PublicRelations [SCHN-PublicRelations@health.nsw.gov.au](mailto:SCHN-PublicRelations@health.nsw.gov.au)

<b>Approved by:</b>	SCHN Policy, Procedure and Guideline Committee	
<b>Date Effective:</b>	1 <sup>st</sup> November 2021	<b>Review Period:</b> 3 years
<b>Team Leader:</b>	SCHN Medico Legal Manager	<b>Area/Dept:</b> Clinical Governance

## CHANGE SUMMARY

- Updated and revised SCHN Policy [2016-9022 v1] to reflect the current law and changes in practice

## READ ACKNOWLEDGEMENT

- All staff need to be aware of their obligations and procedures relation to the receipt and response to subpoenas.
- Staff are required to be familiar with the information referenced in NSW Health Policy Directive [PD2019 001 Subpoenas](#) and the information contained in that Policy shall **not** be repeated in this SCHN Procedure.

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## Purpose

The SCHN is often required to produce documents, including on subpoena, and a proper officer or staff member may be required to attend court to give evidence.

This Procedure document links to the relevant NSW Health Policy Directive which reflects current legislation and outlines procedures to be followed to assist staff, and the SCHN as an organisation, to comply with subpoenas and other requests for the production of documents, or giving evidence.

Hospital Managers and Staff have a responsibility to

- Understand the legislative requirements of a Subpoena.
- Provide only the documents which are requested under the schedule of the subpoena.
- To be aware of whether any claim for privilege over the documents can be applied and to take appropriate action to bring this to the attention of the relevant Manager internally.

## Scope

This policy applies to all the Sydney Children's Hospitals Network staff who are in receipt of and/or must provide a response to subpoenas

Staff are required to be familiar with the information referenced in NSW Health Policy Directive [PD2019 001 Subpoenas](#) and the information contained in that Policy shall **not** be repeated in this SCHN Procedure.

## Related Documents

- *Children and Young Persons (Care and Protection) Act 1998 (NSW)*
- *Civil and Administrative Tribunal Act 2013 (NSW)*
- *Coroners Act 2009 (NSW)*
- *Commonwealth Service and Execution of Process Act 1992 (Cth)*
- *Criminal Procedure Act 1986 (NSW)*
- *Evidence Act 1995 (NSW)*
- *Health Administration Act 1982 (NSW)*
- *Interpretation Act 1987 (NSW)*
- *Local Court Rules 2009 (NSW)*
- *Uniform Civil Procedure Rules 2005 (NSW)*
- *State Records Act 1998 (NSW)*
- *NSW Health Privacy Manual*
- *Health Records and Information Privacy Act 2002 (NSW)*
- *Government Information (Public Access) Act 2009*

## Abbreviations and Terms

The following are common abbreviations or terms used when dealing with subpoenas and may be found in this document and/or [Subpoenas PD2019\\_001](#):

Term	Meaning
<b>Approved form</b>	In relation to a document, means the form approved under Section 17 of the <i>Civil Procedure Act 2005</i> for the purposes of that document.
<b>Care Proceedings</b>	Are Court proceedings where an application for a “care order” is made for the protection of a child or young person.
<b>CHW</b>	The Children’s Hospital at Westmead
<b>Court</b>	For a detailed list of Courts, refer to Appendix C of <a href="#">PD2019_001 Subpoenas</a> <i>Note</i> : Court includes tribunal.
<b>Corporate Record</b>	Any record held in any format, including digital (electronic) records, which is not a record or documents that is contained within a patient/client health record and Workforce personnel records. See <a href="#">Corporate Records Management Policy</a> for more information.
<b>Defendant or Respondent</b>	The person against whom the action is brought by the Plaintiff/Applicant.
<b>Document</b>	Any record of information and includes: <ol style="list-style-type: none"> <li>1. anything on which there is writing;</li> <li>2. anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or</li> <li>3. anything from which sounds, images or writings are capable of being reproduced with or without the aid of anything else.</li> </ol>
<b>Health record</b>	A documented account, whether in hard copy or electronic form, of a patient’s health, illness and treatment during each visit or stay at a health service. This may include electronic correspondence regarding the patient’s treatment and records (such as x-rays or a community mental health record) that are stored separately from the patient’s medical record. <i>Note</i> : Health record holds the same meaning as: ‘health care record’, ‘medical record’, ‘clinical record’, ‘clinical notes’, ‘patient record’, ‘patient notes’, ‘patient file’, and so on
<b>Issuing Party</b>	The person who has caused the subpoena to be issued.
<b>Legal Privilege</b>	Protects certain documents being disclosed in court proceedings. These documents are protected from release under subpoena due to a special statutory or legal relationship that applies to the information.
<b>Patient</b>	Any person who receives a health service and to whom, as a result, a health practitioner owes a duty of care. Also includes clients of PHOs.
<b>PHO</b>	Under the <i>Health Services Act 1997</i> , a Public Health Organisation (PHO) is a Local Health District or a statutory health corporation (including Specialty Health Networks), or an affiliated health organisation in respect of its recognized establishments and services.
<b>Proper Officer</b>	A person within the organisation who will have access to the records pertained in the subpoena.

<b>Plaintiff or Applicant</b>	The person who has commenced the proceedings.
<b>Record</b>	Includes any document or other source of information compiled, recorded or stored in written form or on film, by electronic process or in any other manner or by any other means.
<b>Return Date</b>	The last day the documents must be produced to the Court.
<b>SCH</b>	Sydney Children's Hospital, Randwick
<b>SCHN</b>	Sydney Children's Hospitals Network
<b>Subpoenaed Party or Addressee</b>	The person who is the subject of the order expressed in the subpoena. A subpoena can only be addressed to a person, which may be the proper officer of an organisation.

## Introduction

This document **must** be read in conjunction with NSW Health Policy Directive [PD2019\\_001 Subpoenas](#).

There are occasions when the SCHN staff, both clinical and non-clinical, may receive direct requests from the Police, Coroner, Patients, Families, Lawyers or other bodies or institutions to produce documentation or information, or to give evidence in proceedings.

There are procedures in place to deal with all such requests. Most importantly, **all requests must be in writing** and must be made under the relevant GIPPA, HRIPA, Chapter 16 A, Warrant, Subpoena, or similar formal route to access the information concerned, BEFORE release of the documentation in question can be facilitated by the SCHN, or any member of its staff.

**No information should be released on the basis of a verbal request only**, or without following the procedures as laid down in this Procedure and the related policies

For ease of reading this document, reference shall be made to requests for patient-related information where a Subpoena has been received, however, the same basic principles shall apply to non-clinical records, including Corporate Records, Workforce Records and Research and Data records.

## Responding to a Subpoena

### General:

A subpoena is an order from a court requiring the Addressee to:

1. Produce to a court a copy of the subpoena and documents or things as directed by the subpoena;
2. Attend a court to give evidence as directed by the subpoena; or
3. Do both.

All subpoenas must be responded to in a timely fashion. No subpoena should be ignored at risk of attracting penalties, including sanction for possible Contempt of Court.

A subpoena can only capture documents that are already in existence and within the possession or control of the SCHN. A Subpoena should not require the creation of a document that does not already exist.

All documentation created/recorded or stored by any member of staff in the ordinary course of carrying out their duties within the scope of their employment with the SCHN, is the property of the Organisation and requests to produce such document should be guided by the appropriate Manager identified below, according to the type of record in question.

## Subpoena to produce documents

Staff receiving requests to produce any document/data via Subpoena, should:

1. Familiarise themselves with NSW Health Policy Directive [PD2019 001 Subpoenas](#); and
2. Promptly email any requests for the production of document/reports/information as follows:

### (i) Clinical Information:

Directly to the **Health Information Unit** (HIU) at [SCHN-MedicoLegal@health.nsw.gov.au](mailto:SCHN-MedicoLegal@health.nsw.gov.au)  
HIU will process the request and ensure proper compliance with the terms of the subpoena, including ensuring that the request is properly documented and the response and documentation in question is appropriately responded to and dispatched in a timely manner to the relevant court or Tribunal on behalf of the individual or the SCHN;

### (ii) Corporate Records and/or Financial Records (being any corporate or business Information (as defined) not held by the HIU, Research or Workforce):

Directly to the **Director of Finance and Corporate Services** [SCHN-DFCS@health.nsw.gov.au](mailto:SCHN-DFCS@health.nsw.gov.au).

Refer also to the SCHN [Corporate Records Management](#) Intranet page for further guidance, or review the [Corporate Records Management Policy](#) in this regard; or

### (iii) Workforce Records (being any information not held by HIU or Corporate Records):

Directly to the Associate Director of Workforce ([SCHN-StaffLink@health.nsw.gov.au](mailto:SCHN-StaffLink@health.nsw.gov.au)), and

### (iv) Patient Research Data collected in the course of clinical research, or patient-reported data arising from patient surveys, directly to [SCHN-Research@health.nsw.gov.au](mailto:SCHN-Research@health.nsw.gov.au)

### Note:

**Do not respond to a subpoena** if it is not addressed to you, but ensure that it has been attended to by **referring it to one of the contact email addresses above without delay.**

## Subpoena to give evidence

Staff members who are requested to give evidence in any court or tribunal should always request that they be issued with a subpoena to attend court. Informal requests via email, letter or telephone should not be entertained, as this carries a number of risks for the person concerned, including possible Privacy legislation breaches.

Where a staff member receives a **subpoena to give evidence** in court on a particular date and time, that person needs to do so as indicated on the subpoena, ***unless an alternative arrangement has been confirmed in writing with the person responsible for issuing the subpoena.***

*Alternative arrangements to accommodate Healthcare workers with limited disruption to clinical practice is almost always possible. This may include the possibility of giving evidence via Telephone or Video link, if necessary, or agreeing a specific day and time to give evidence, as opposed to remaining in attendance throughout, as the Subpoena would state. HOWEVER, this must be specifically arranged and confirmed in each case and cannot be presumed or relied upon without proper discussion and (written) confirmation.*

If the person named in the subpoena does not comply with court attendance, the court can issue a warrant for their arrest and they can be charged with contempt of court (failure to comply with a court order).

## Providing Expert Evidence

There may be times where staff are asked to provide expert evidence in legal matters. This evidence is frequently provided via a **Certificate of Expert Evidence**. If a staff member is nevertheless required to attend court to provide this evidence, they will be issued a subpoena to attend court. S177 of the [Evidence Act 1995](#) (NSW) provides for the use of **Certificates of Expert Evidence** to avoid, where possible, the unnecessary attendance of expert witnesses at court where their evidence is not contested by the defence

If however, one of the parties' legal representatives serves written notice that the expert is required to give evidence at a court hearing, the prepared Certificate is then inadmissible as evidence and the expert is required to attend court. The expert and any relevant documentary evidence will then be subpoenaed and the expert concerned will be required to attend court.

## Receiving a Subpoena to give evidence: next steps

Staff receiving a Subpoena to give evidence, should:

1. Familiarise themselves with NSW Health Policy Directive [PD2019 001 Subpoenas](#); and.
2. Inform their immediate line- manager so that rosters can be adjusted accordingly to ensure coverage of service.
3. Email a copy of the subpoena to give evidence to the SCHN Medico-Legal Manager on [SCHN-CGU@health.nsw.gov.au](mailto:SCHN-CGU@health.nsw.gov.au) so that:
  - i. Appropriate support can be arranged, if required, prior to court attendance;
  - ii. Communication with the issuing lawyer and logistics can be facilitated and the level of support required, if any, can be determined;
  - iii. Concerns can be raised with the SCHN Medico-Legal Manager, or in their absence, the Director of Medical Administration and Clinical Governance, regarding:
    1. The disclosure of any information which may be privileged, or confidential, or otherwise causing concern;
    2. Availability issues and mode of giving evidence (alternatives can sometimes be arranged);
    3. Any other issue of concern can be addressed;
    4. Legal representation, if required, can be arranged in a timely manner.
4. **Familiarise** themselves with all relevant documentation (e.g. entries documented in the Medical Record/any Report or Statement previously provided to the Police/Coroner);
5. Confirm the arrangement regarding time, place and mode of giving evidence that has been agreed with the person intending to call them as a witness, with the assistance of the SCHN Medico-Legal Manager, if required;
6. **Arrange** a suitable support person, if necessary with the assistance of their line manager, Head of Department or Clinical Program Director (CPD) and
7. **Diarise** attendance at the hearing, as required.
8. **Consider and communicate** adequate de-briefing/support plan with their Line Manager for after the appearance.

## Attending Court

When attending court:

- Arrive at court early.
- Wear professional/business attire, or appropriate uniform (e.g. nurses uniform)
- Take along a support person (e.g. manager, family member or friend)
- Ensure you have all relevant documentation with you;
- Take along some basic refreshments – it is not unusual to have a long wait on the day before you are called into court to give your evidence.
- All requests for Media Statements arising from giving evidence under subpoena before any court or tribunal must be referred to the Director of Communications and Engagement to provide an appropriate response on behalf of the SCHN.
  - SCHN-PublicRelations: [SCHN-PublicRelations@health.nsw.gov.au](mailto:SCHN-PublicRelations@health.nsw.gov.au)

## Debriefing

It is important to debrief once you have given evidence. This should, where possible, be arranged in advance with your line-manager and if required, with the SCHN Medico-Legal Manager. If additional support is required, please also access EAP Services.

## Feedback to Subpoenaed Witness

In many matters in which staff are subpoenaed to give evidence, the SCHN is not a party to proceedings and will not be aware of final outcomes. In many instances, as these matters involve minors, there will be Suppression Orders in place which prevent the discussion of outcomes with third parties, including the SCHN.

Where feedback is able to be shared, this will be shared with the relevant heads of departments or CPD to feedback to staff.

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