



Investigation report

**PathWest's management of
a complaint about disclosure of
confidential personal information**

Enquiries:

Public Sector Commission
Dumas House, 2 Havelock Street, WEST PERTH WA 6005
Locked Bag 3002, WEST PERTH WA 6872
Telephone: (08) 6552 8500
Fax: (08) 6552 8710
Email: admin@psc.wa.gov.au
Website: www.publicsector.wa.gov.au

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Letter of transmittal

THE SPEAKER
LEGISLATIVE ASSEMBLY

THE PRESIDENT
LEGISLATIVE COUNCIL

In accordance with section 22E of the *Public Sector Management Act 1994* (PSM Act), I hereby submit to the Parliament of Western Australia this report of an investigation into the handling of a patient complaint by PathWest Laboratory Medicine WA.

This report relates to an investigation conducted under section 24 of the PSM Act and in my opinion is of such significance as to warrant reporting to Parliament.



M C Wauchope AO
PUBLIC SECTOR COMMISSIONER

22 November 2017

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Commissioner's foreword

On 31 August 2017, in response to correspondence from Professor Bryant Stokes AM, Chair of the North Metropolitan Health Service (NMHS) Board, I initiated an investigation under section 24 of the *Public Sector Management Act 1994* (PSM Act).

This investigation was to consider PathWest Laboratory Medicine WA's (PathWest's) management of a complaint raised by a patient in March 2016. The complaint related to the disclosure of the patient's pathology test results by a PathWest employee to a third party. The response to allegations raised in the complaint led to a disciplinary process.

Allegations of an employee engaging in serious misconduct were substantiated. The matter was appropriately notified to the Corruption and Crime Commission (CCC) and was considered finalised. Twelve months later, the patient raised a further complaint that the employee had not been appropriately sanctioned for the behaviour. This led to Professor Stokes' correspondence to me.

I have elected to disclose certain information in this report that I consider to be in the public interest. This reflects the importance of public confidence in the integrity of complaints management in the public health system, and in the security of personal information held by the health service providers. I have disclosed certain details of the confidential disciplinary process applied by PathWest as information collected through the process was established in fact. However, the strong public interest in protecting the privacy of individuals is acknowledged, and individuals have not been identified (and in some cases, information is omitted).

The potential impact of the use of confidential personal information for other than its intended purpose is not to be underestimated. While steps taken to discipline the PathWest employee—and the authority of the Department of Health to determine the sanction, as the employer at the time of the matter—are acknowledged, the sanction applied may not be broadly consistent with public expectation given the seriousness of the misconduct. All public authorities have a responsibility to provide an environment that mitigates and prevents misconduct. While awareness and education are essential to misconduct prevention, the response of employing authorities to discipline matters, and the nature of any sanctions applied, also serve as a deterrent.

The assessment of documents from PathWest's management of the complaint, and information obtained through staff interviews conducted as part of this investigation, have

highlighted the importance of effective complaints handling in identifying and addressing potential systemic issues arising from specific matters.

I have considered the complaint in the context of this type of misconduct not being commonly reported by PathWest to the Public Sector Commission (Commission).

Notwithstanding this, my findings from the investigation have identified the following broad areas of opportunity to improve practices:

- management of the risk of a breach in patient confidentiality
- application of policy
- provision and receipt of advice and information to complainants
- record keeping
- investigation of disciplinary matters.

A summary of my recommendations are provided on the following page.

A handwritten signature in blue ink, appearing to read 'M C Wauchope', is positioned above the printed name and title.

M C Wauchope AO
PUBLIC SECTOR COMMISSIONER

Summary of recommendations

The following recommendations are made with the aim of improving complaints handling and supporting patient confidentiality within PathWest, and NMHS more broadly, into the future.

With respect to protecting patient confidentiality, it is recommended that NMHS:

- 1.1 audit the completeness and currency of records of confidentiality declarations by staff
- 1.2 require all PathWest staff to complete refresher Accountable and Ethical Decision Making (AEDM) training within the next six months
- 1.3 take steps to monitor staff awareness of responsibilities in relation to patient confidentiality
- 1.4 ensure data custodians have comprehensive knowledge of relevant policies and their responsibilities under these policies
- 1.5 where relevant, ensure data breach response protocols are followed to mitigate any potential adverse impact.

With respect to complaints management, it is recommended that NMHS:

- 2.1 include information on the PathWest website that assists members of the public with how to make a complaint
- 2.2 develop and publish a PathWest customer service charter that refers to the complaint process
- 2.3 ensure PathWest staff who receive complaints are trained in complaint resolution and have comprehensive knowledge of the complaints policy
- 2.4 review PathWest's process for complaints handling to have a greater emphasis on assessment, action planning, evaluation and record keeping
- 2.5 where applicable, close complaints alleging misconduct on direction into a discipline process.

With respect to misconduct management, it is recommended that NMHS:

- 3.1 document the policy and process for identifying a decision maker in PathWest
- 3.2 ensure that PathWest's investigation approach is documented and commensurate with risk
- 3.3 notify potential breaches of the Criminal Code to WA Police, subject to NMHS' and Police's current policy.

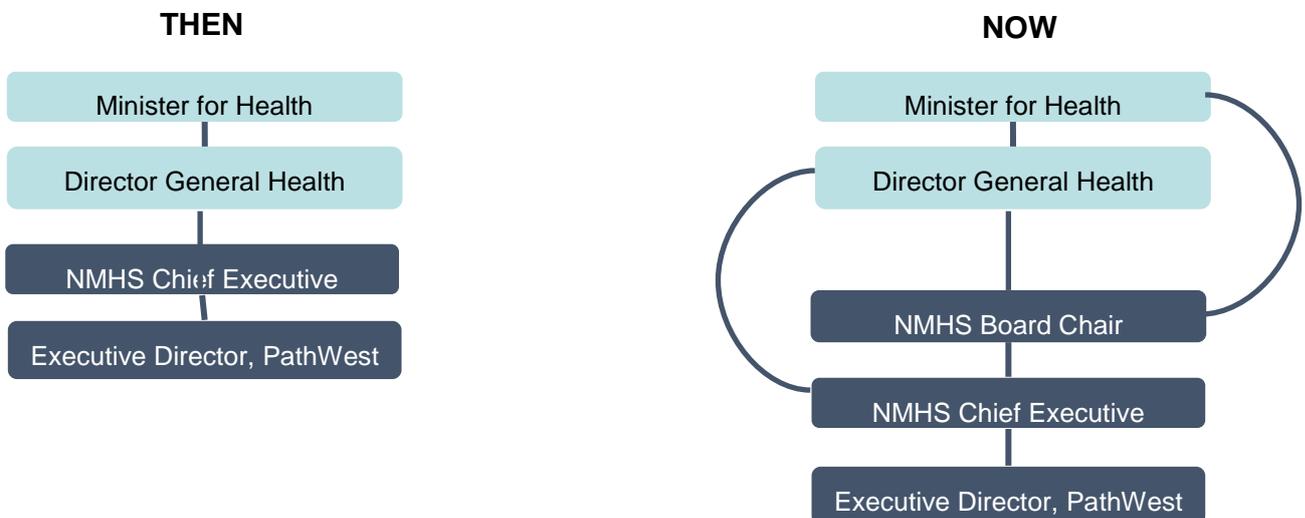
Introduction to PathWest

PathWest is the pathology arm of the Western Australian Government, with a network of 23 laboratories and over 50 specimen collection centres across the State. The organisation provides a range of diagnostic and laboratory medicine services around the clock, as well as forensic services, research and teaching activities.

At the time of the original complaint, PathWest operated as a largely autonomous service within NMHS, overseen by a Chief Executive. Together, NMHS, the South Metropolitan Health Service and the Child and Adolescent Health Service comprised the Metropolitan Health Service (MHS). The Director General of the Department of Health was the accountable authority for the MHS.

On 1 July 2016, the MHS was abolished with the commencement of the *Health Services Act 2016*. PathWest is an administrative division of NMHS, which is now a discrete statutory authority governed by the Chief Executive and a Board of Authority. The Board is the steward and sets strategic and operational direction within the scope of the Department's policy framework. The NMHS Board Chair is the accountable authority for NMHS. NMHS is responsible to the Minister for Health and the Department, led by the Director General as the system manager.

PathWest and NMHS reporting relationships, March 2016 and November 2017



Background to the Commissioner's investigation

On 3 March 2016, a PathWest patient (the Complainant) made a complaint to PathWest through correspondence to the former Premier and the former Minister for Health. The Complainant alleged a PathWest employee (the Respondent) had disclosed the Complainant's test results to a third party and advised that party to seek medical attention, implying the results could be representative of a potential risk to the third party's health.

The complaint was referred to the Department of Health, as the Director General was the accountable authority at the time, and the Department referred the matter to PathWest through NMHS.

The matter was initially dealt with as a complaint, which triggered a misconduct process. The misconduct allegations were substantiated by PathWest in a discipline process¹ following the Respondent's admission. A first warning was issued.

As required for 'category 3' serious misconduct, the allegations and action taken by PathWest were notified at conclusion to the CCC.² The CCC took no further action and closed the file. The CCC considered that the Department had taken appropriate action as the employer and accountable authority.

On 2 June 2016, the Complainant was advised the matter was complete. The letter stated 'the findings...and any associated disciplinary outcomes will remain strictly confidential and cannot be disclosed to you as the complainant'. The Complainant noted this advice did not meet the requirements of the *WA Health complaints management policy 2015* (complaints policy) and requested an amended response.

On 27 June 2016, the Complainant was further advised an act of misconduct had occurred and that appropriate action consistent with the *WA Health misconduct policy 2014* (misconduct policy) had been taken. The letter also stated that, as a result of the

¹ 'Misconduct process' and 'discipline process' have a similar meaning and are used interchangeably in this report. This reflects the scope of the (now superseded) *WA Health Misconduct policy 2014*, which was applied as the Respondent was not subject to the Part 5 provisions of the PSM Act.

² 'Category 3' and relevant obligations are defined in the Corruption and Crime Commission's 2015 *Guidelines for notification of serious misconduct for principal officers of notifying authorities*. This category is defined as 'low level' serious misconduct.

matter, PathWest was implementing refresher training to all staff on the WA Health code of conduct and the *Code of Ethics*.

In June 2017, a request for redress was sent by the Complainant to the Minister for Health, with a further complaint that the Respondent had retained employment despite the serious misconduct being substantiated.

In August 2017, the Complainant raised the matter through the media.

On 21 August 2017, the Chair of the NMHS Board sought an independent review by the Public Sector Commissioner (Commissioner) of PathWest's handling of, and response to, the original complaint. The Chair expressed concern that public interest in the matter may compromise confidence in the integrity of PathWest as the State's main provider of pathology services.

Following consultation with the CCC, the Commissioner undertook to investigate in accordance with section 24 of the PSM Act.

At the same time, the Commissioner commenced a separate and broader review across the Health Service Providers (HSPs) of controls that prevent unauthorised access to confidential information. That review is not the subject of this investigation report and is anticipated to be reported separately at a later date.

The Commissioner's review of PathWest systems controlling the integrity of forensic results was also undertaken separately from this investigation.

Investigation approach

Scope of the investigation

This report provides information in regard to improving PathWest's complaints and misconduct management. In general, the Complainant's original allegations and any other possible misconduct by the Respondent were not investigated by the Commission.

This investigation was undertaken separately from two related reviews by the Commission. These are in relation to PathWest's management of forensic samples and the HSPs' management of the risk of unauthorised access to confidential patient information.

Objective

The objective was to investigate and report on PathWest's response to the complaint about disclosure of confidential personal information.

The investigation considered:

1. whether the actions taken in response to the complaint were consistent with relevant obligations for managing complaints and potential misconduct
2. whether the determination of the sanction applied was based on relevant factors and the available information
3. any other matter considered relevant to the management of the complaint.

Authority

The authority for the investigation was section 24 of the PSM Act, which states:

- (1) The Commissioner may, for the purpose of performing his or her functions, investigate the activities of any public sector body and for that purpose the Commissioner, or a person authorised by the Commissioner in writing, has all the powers conferred on a special inquirer by this Act.

The work was undertaken by Commission employees, on behalf of the Commissioner, rather than as independently authorised persons.

Methodology

The activities undertaken as part of the investigation included:

- consideration of recognised standards and principles for investigative practices
- consultation with the CCC on the notified misconduct
- engagement with the Complainant (not available to participate in interview)
- assessment of documents against the requirements of the Commissioner's standards and instructions, WA Health policy framework, *WA Health – HSUWA – PACTS – Industrial Agreement 2014*, and standards and guidelines from external bodies such as the CCC and the Ombudsman WA
- interviews with PathWest staff involved in the matter.

Assumptions and limitations

The assumptions of the investigation included that all staff interviewed:

- answered questions put to them in an honest manner
- accurately recalled events and actions described, given the time elapsed since the complaint was made (March 2016) and since the misconduct occurred (August 2014).

The limitations included:

- the Complainant (apart from an introductory phone call) and Decision Maker 1 were unavailable for interview during this investigation
- the evidence collected through the investigation was persuasive rather than conclusive.

The recommendations of this report are not intended to be definitive and are for further consideration by NMHS.

Events leading to the complaint

The key events leading to the complaint made by the Complainant on 3 March 2016 (to the then Premier and the then Minister for Health) are shown in the following table.

Date	Event/action
14 August 2014	The Complainant provided a sample to Perth Pathology. One pathology test was referred to PathWest.
15 August 2014	The Complainant's sample was received at PathWest.
18 August 2014	The Respondent allegedly saw the Complainant's test results while scanning hard copy forms into the PathWest laboratory computer system as part of routine work duties.
18 August 2014	The Respondent disclosed the Complainant's test results to a third party and told that party to seek medical treatment, implying the results could be representative of a potential risk to the third party's health.
20 August 2014	The Complainant received the test results from Perth Pathology.
14 January 2016	The third party advised the Complainant of the disclosure by the Respondent.

Part 1 – Management of the complaint

The complaints management framework

The investigation noted the key requirements in relevant instruments and policies³ that guide PathWest's approach to complaints handling include:

- the organisation shows commitment to resolving complaints, including resourcing
- the organisation has policy and procedures for resolving complaints
- the complaints process is well-advertised
- the complaints process is clear and accessible
- the complaints process is free of charge.

PathWest follows the WA Health complaints handling framework (framework) for complaints not related to clinical incidents. This was the case for the complaint that is the subject of this investigation report. The complaint related to administrative practices around clinical information, but was not considered a clinical incident.

An assessment of the complaints policy showed it provides process steps, supporting material and guidance. The complaint receipt and management forms contained within are particularly useful templates for capturing and communicating relevant information.

Interviews with PathWest staff established that the Complaints Handling Officer role, as referred to in the complaints policy, is assumed by different PathWest managers depending on the work area that is subject to a complaint. Complaints are escalated to more senior officers as required.

One Complaints Handling Officer advised that PathWest provides customer feedback forms in sample collection centres. Also, feedback received at hospitals is communicated through various networks. There is no charge to lodge a complaint.

Website and complaints

The investigation considered that the PathWest website is an important communication tool in complaint resolution, particularly where matters arise some time after sample collection. There are 'contact us' links on the front page of the website to a simple web form, which enables patients to submit feedback, amongst other things.

³ For further information, see References at the end of this report.

However, there is no clear link on the PathWest website to information that helps people lodge a complaint (such as the Patient Opinion Australia link on the NMHS site). The Commission's *Public Sector Commissioner's Circular 2009-27: Complaints management* requires certain information to be provided on agency websites.

Comment received from the Complainant during the investigation suggested that the way to raise concerns through the Department of Health, Health and Disability Services Complaints Office (HaDSCO) and other oversight agencies was unclear to the Complainant. This resulted in the complaint being made through the former Premier and the former Minister for Health. While this is a legitimate avenue, making more information available online may help patients make fully informed choices about where and how to make complaints.

Commissioner's recommendations

- In accordance with *Public Sector Commissioner's Circular 2009-27*, it is recommended that NMHS add a link on the front page of PathWest's website to information that assists members of the public with how to make a complaint, including other reporting pathways through relevant oversight agencies.

Stages of the complaints process

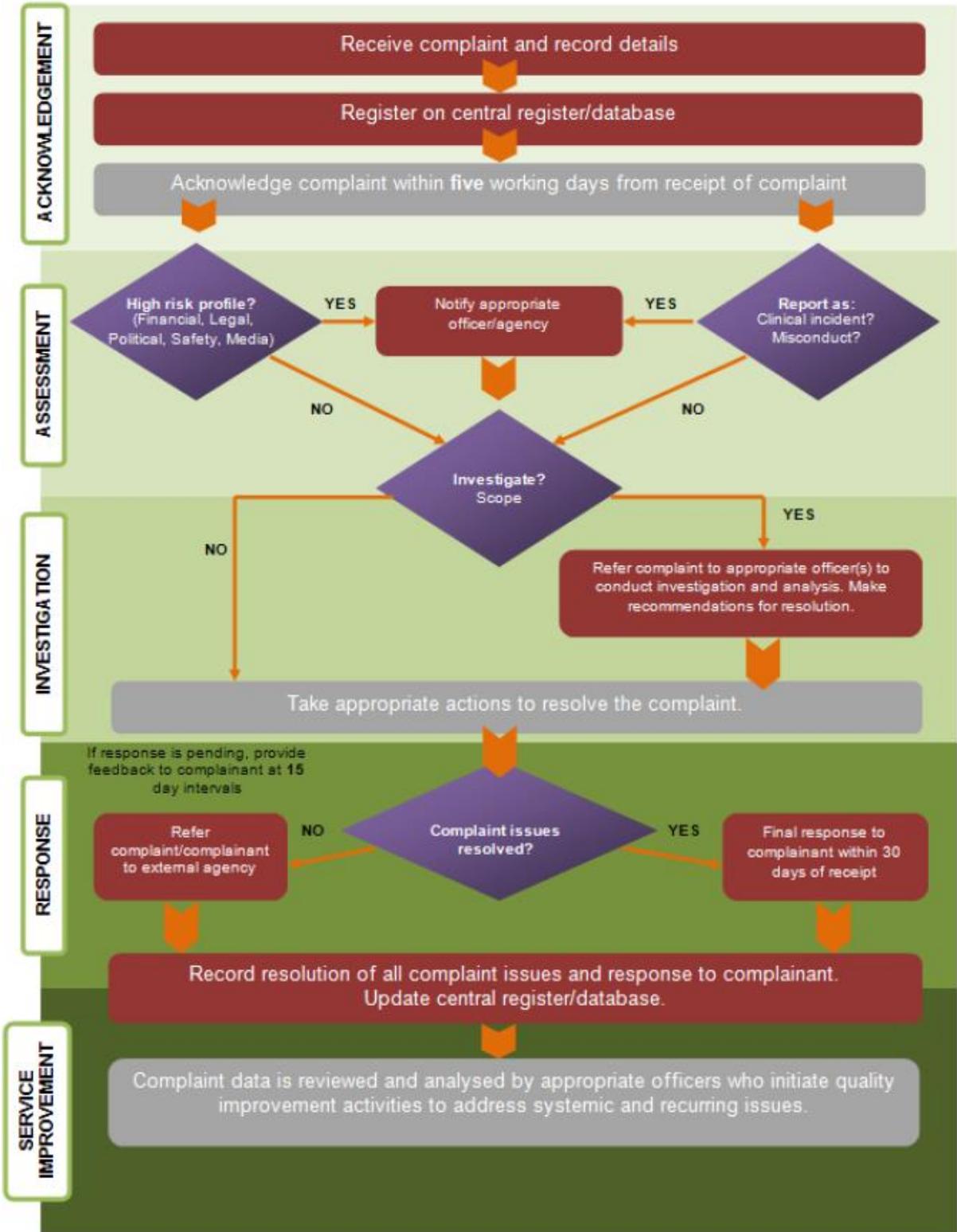
For the complaint under investigation, PathWest followed the complaints process summarised in Figure 1. This has five broad stages:

- acknowledgement
- assessment
- investigation
- response
- service improvement.

The framework states that not all complaints warrant a full investigation. The level of response depends on factors such as the complexity of events and the outcome sought by the complainant. In this case, an investigation was not conducted by PathWest as the complaint was quickly identified as having conduct implications and therefore directed into a discipline process.

The four relevant stages (excluding the investigation stage) that comprise the management of this complaint are described in this section of the report.

Figure 1: The complaints management process



Source: WA Health complaints management policy 2015

Stage 1: Acknowledgment

As per the complaints policy, the first stage in complaints management is acknowledgment. The investigation noted the key requirements for this stage are:

- the complainant is encouraged to lodge a formal complaint during initial contact
- staff are trained in complaints handling
- the complaint is courteously acknowledged within five days, including confirmation of the desired outcome and expected timeframe to resolve
- the complaint is recorded and registered centrally, separate to medical records
- the complainant's personal information is protected.

The key events associated with PathWest's acknowledgment of this complaint are outlined in the following table.

Date	Event/action
5 February 2016	<p>The Complainant called the main PathWest phone number and spoke to a Complaints Handling Officer. The Complainant mentioned a confidentiality issue and indicated a staff member had divulged the Complainant's test information.</p> <p>The Officer asked the Complainant to lodge a complaint in writing due to the serious nature of the complaint.</p>
29 February 2016*	<p>The Complainant spoke to the Department of Health's Purchasing and System Performance Division. Records show the Complainant was "reluctant" to make a complaint through PathWest as believed "it won't be dealt with properly".</p> <p>The Complainant was referred to the Department of Health's Ethical Advisory Line (EAL) by the Division. There is no further record available of the Complainant contacting the EAL.</p>
3 March 2016	<p>The Complainant wrote to the then Premier and the then Minister for Health about the breach of confidentiality. The Complainant requested the allegations be investigated and the outcome provided.</p>
11 March 2016	<p>The Complaints Handling Officer received the complaint from the then Minister for Health through PathWest's Executive Director.</p> <p>The Complaints Handling Officer was asked to review the complaint.</p>
17 March 2016	<p>A briefing note (see Appendix 1 to this report) was prepared by the Complaints Handling Officer for the then Minister for Health. This advised the complaint would be progressed under the misconduct policy.</p>
29 March 2016	<p>The then Minister for Health wrote to the Complainant advising the Complaints Handling Officer and a decision maker would conduct a full review in accordance with the complaints policy.</p>

Note: * denotes an approximate date

Communication

The initial telephone call with the Complainant, and the formal complaint letter through the then Minister for Health, were handled by the Complaints Handling Officer. The Officer expected to directly receive a letter of complaint after the call.

A complainant's preference for a particular mode of communication is key information in acknowledging complaints. A written complaint allows time to ensure important details are not missed and a thorough response is provided, as in the case of allegations of serious misconduct. However, the ability to lodge verbal complaints may improve perceptions of responsiveness.

The complaints policy indicates formal complaints can be lodged verbally. A complaints handling officer can refer back to a complainant if clarification is required and should seek to confirm in writing the interpretation of a verbal complaint.

Desired outcome

Acknowledgement of complaints includes discussion of the outcome that would satisfy complainants. This provides an early opportunity for complaints handling officers to advise complainants if expectations need to be managed.

The Ombudsman WA's 2017 *Guidelines to effective handling of complaints made to your organisation* note the importance of clarifying the resolution sought in order to refer to another body, if necessary.

The Complaint Handling Officer's impression was that the Complainant's desired outcome was dismissal of the Respondent. This impression was reached through the initial phone call from the Complainant but was not confirmed on receipt of the formal complaint through the then Minister for Health. Actively engaging with complainants on receipt of a formal complaint may help improve their view of the organisation and its services.

The investigation found that PathWest staff learn about complaints handling in induction, which may have been completed a number of years ago. They refer to relevant policies as matters arise, which is relatively infrequent.

Commissioner's recommendations

- It is recommended that NMHS ensure PathWest staff who receive and acknowledge complaints have comprehensive knowledge of the complaints policy so they provide and discuss all relevant information.
- Although PathWest's staff training program incorporates customer service skills, it is recommended that NMHS consider refreshing complaints resolution skills, such as mediation, for key positions.

Timeframe

The complaints policy requires complaints be acknowledged within five days. The time to acknowledgement was longer in this matter as the response time for complaints made through Ministerial correspondence is set by the Minister's office.

The complaint was acknowledged through the then Minister for Health due to the serious nature of the complaint. The acknowledgement letter from the Minister to the Complainant confirmed the expected timeframe to resolution and advised all information related to the matter would be treated confidentially in accordance with policy requirements.

Record keeping

The complaints policy notes that complaints contained within Ministerial correspondence should be recorded in the same way as other complaints. Any concern with a high risk profile must be thoroughly documented. The logging of complaints in a centralised register also assists in analysing and monitoring local complaint trends that require quality improvement activity.

The complaint was logged through misconduct case management and personal email folders (restricted to the Complaint Handling Officer's account), rather than the local complaints spreadsheet/ register. PathWest staff advised the reason for this was the serious nature of the allegations.

The investigation observed that records associated with complaints are official information and should be stored in the organisation's official records system (separate from medical records). The Ombudsman WA's 2009 *Guidelines to good record keeping* indicate that storage outside the organisation's official records system can make records of decisions difficult or impossible to locate.

The then Minister for Health's acknowledgement letter to the Complainant advised the Minister would be briefed on the complaint resolution. Although a draft brief was prepared by the Complaints Handling Officer and reviewed by the PathWest Workforce unit, this was not progressed further. This may have been identified earlier had the complaint been logged in a centralised complaints register.

Commissioner's recommendations

- It is recommended that NMHS review record keeping practices in PathWest for complaints containing allegations of minor or serious misconduct.

Stage 2: Assessment

As per the complaints policy, the second stage in complaints management is assessment. The investigation noted the key requirements for this stage are:

- the complaint is assessed for complexity and risk
- the complaint is assessed in an objective and unbiased manner
- the complainant can comment on progress and participate in decisions about handling the complaint.

For this complaint, there was the additional requirement that the complaint is assessed as requiring misconduct reporting (due to the nature of the complaint). This requires a complainant to be informed that discipline matters are confidential and the outcome will not be divulged.

The key events associated with PathWest's assessment of this complaint are outlined in the following table.

Date	Event/action
14 March 2016	The Complaints Handling Officer informally considered the complaint in accordance with the complaints policy. The Officer determined it was "probably misconduct" so referred it to PathWest Workforce.
17 March 2016	The assessment was drafted by PathWest Workforce, using the NMHS template.
18 March 2016	The assessment was reported to NMHS Workforce Services by PathWest Workforce due to the Level 4 'major consequences' risk assessment.
30 March 2016	The Complainant wrote to the Complaints Handling Officer noting the Officer was the 'investigator' and provided evidence.
30 March 2016	The Complaints Handling Officer confirmed a review had commenced and asked the Complainant whether the complaint had been reported to WA Police.
30 March 2016	The Complainant advised no Police report had been made and asked whether the Complainant should report.
31 March 2016	The Complainant wrote to the Complaints Handling Officer to provide further evidence.
31 March 2016	The Complaints Handling Officer confirmed receipt of evidence and the Complainant's advice that the complaint had not been reported to WA Police by the Complainant.
13 April 2016	The Complaints Handling Officer wrote to the Complainant and advised a delay due to the misconduct process.
13 April 2016	The Complainant replied to the Complaints Handling Officer advising receipt of advice of delay.

Informal assessment

PathWest advised the assessment that is recorded for the complaint relates only to the misconduct process. A key delineation in the record keeping for the complaint is that only the Complaints Handling Officer corresponded with the Complainant.

The investigation found that the Complaints Handling Officer informally reviewed the matter in accordance with the complaints policy and referred it to the PathWest Workforce unit for misconduct case management.

It may have been prudent for the Complaints Handling Officer to record the review undertaken against the complaints policy, given the serious nature of the matter. This would have helped ensure due consideration was given to:

- whether the complainant's expectations needed to be managed around the desired outcome or communication of a confidential outcome
- whether the complaint should be reported through other incident management processes (such as data breach reporting)
- whether the complaint contributed to an emerging trend that needed to be addressed.

Given no other assessment was recorded, the recorded assessment for the misconduct process is considered here against the requirements of the complaints policy, and against the misconduct policy later in this investigation report.

Risk assessment

The initial risk assessment was prepared by the PathWest Workforce unit and reviewed by a decision maker for the misconduct process. The risk assessment focused on consequences in accordance with the 2013 *WA Health risk management policy* and the assessment template provided by NMHS.

The investigation observed that a different risk assessment method is referred to in the complaints policy. The complaints policy method also assesses the likelihood of event recurrence, which may help trigger consideration of the potential for any systemic issues.

Categorisation

The complaint was categorised as possible misconduct as part of the misconduct process. The investigation observed that a broader list of categories is referred to in the complaints policy, such as 'communication', 'rights, respect and dignity' and 'professional conduct'. This also encourages consideration of any systems issues.

Commissioner's recommendations

- It is recommended that NMHS review the assessment approach taken for complaints alleging misconduct to ensure the potential for systemic and emerging issues is assessed and recorded as well as individual misconduct.

Engagement

The Australian Standard for complaints handling (*AS ISO10002:2006*) suggests that talking to people ‘from both sides’ is important in complaints handling. Offering to meet with complainants to hear ‘their side of the story’ may help build trust and increase satisfaction with the process.

For this complaint, additional information or input was not actively sought from the Complainant on the circumstances of the matter, apart from asking whether the Complainant had notified WA Police. The Complainant initiated the provision of further evidence on receipt of the then Minister for Health’s acknowledgement letter.

The investigation observed regular updates were provided to the Complainant in accordance with the requirements of the complaints policy. Written communication between the Complainant and the Complaints Handling Officer was found to be cordial and professional through the process.

Commissioner’s recommendations

- It is recommended that NMHS consider the way that complaints handling officers engage with complainants on allegations of serious misconduct.

From complaint to misconduct

The progress update to the Complainant on 13 April 2016 identified the matter would be continuing through the misconduct process and that “a complete response to your complaint” would be provided. The update did not advise the discipline process is confidential. This was significant in that the confidentiality requirement almost guaranteed the Complainant would not be provided with a complete response. An explanation at this point may have helped in managing the Complainant’s expectations.

The Australian Standard (*AS ISO10002:2006*) suggests separating complaints handling and discipline processes. This encourages a focus on improving any systemic issues (such as a need to improve staff awareness) rather than assigning blame. It also ensures a respondent’s rights are recognised and respected. Similarly, the ‘Misconduct reporting and investigation process’ flowchart in the complaints policy represents the discipline process as external to complaints management.

‘Example letter 5’ in the complaints policy toolkit describes a complaint closing on referral to the discipline process. This is the point at which a complaints handling officer ceases correspondence with a complainant. In keeping with the requirements of the misconduct policy, a decision maker can then advise a complainant in writing when the matter has concluded. In this matter, the complaints process remained open while the discipline process progressed.

Commissioner's recommendations

- Where matters relate to isolated acts of misconduct, and there is no practicable opportunity for systems improvement, it is recommended that NMHS close complaints on direction into the discipline process due to the confidentiality requirements of that process.

Stage 3: Response

The third stage (where the investigation stage does not occur) in complaints management is response. The investigation noted the key requirements for this stage are:

- the complaint is tracked with the status provided to the complainant at regular intervals
- a response to the complaint is provided within 30 days, where possible
- the response is sent to the complainant as soon as a decision is made, advising of the right to external review
- any action taken is planned for and recorded
- any action taken is commensurate with risk and appropriately endorsed.

The key events associated with PathWest's response to this complaint are outlined in the following table.

Date	Event/action
9 May 2016	The Complaints Handling Officer wrote to the Complainant with a progress update. The Complainant replied advising receipt of the update.
1-2 June 2016	The Complaints Handling Officer drafted the final response to the Complainant for review by PathWest Workforce. PathWest Workforce advised the Officer to add mention of HaDSCO as per the complaints policy.
2 June 2016	The Complaints Handling Officer wrote to the Complainant advising the matter was complete and the outcome confidential. The letter gave a corporate apology, referred to HaDSCO and advised closure.
2 June 2016	The Complainant replied to the Complaints Handling Officer advising the response did not meet the requirements of the complaints policy. Specifically, it did not provide incident details, reasons for decisions, and the changes made. The Complainant asked for an amended response.
3 June 2016	The Complaints Handling Officer requested advice on an amended response from PathWest Workforce. PathWest Workforce referred to the Health Industrial Relations Service (IR) for advice. IR referred PathWest Workforce to a template letter from the misconduct policy to draft an amended response.
7 June 2016	The Complaints Handling Officer acknowledged the Complainant's request for an amended response and advised that the Officer will be in touch.
7 June 2016	PathWest Workforce requested IR to approve the amended response.
14 June 2016	PathWest Workforce repeated the request for IR to approve the amended response and IR suggested some changes. PathWest Workforce sent the amended response to the Complaints Handling Officer.
27 June 2016 (due to leave)	The Complaints Handling Officer wrote to the Complainant naming the Respondent, confirming misconduct did occur and advising refresher training is being progressed for all staff on the <i>Code of Ethics</i> and the WA Health code of conduct.
5 July 2016	The Complainant acknowledged receipt of the final response.
8 July 2016	The PathWest Executive Director emailed a broadcast about patient confidentiality to all PathWest staff (with managers to inform staff not on the email system).
Late 2016	PathWest commenced developing confidentiality refresher training for staff. [This has not been delivered to staff to date.]
February 2017	Additional information about responsibilities in relation to patient confidentiality was added to the PathWest staff induction program.

The 'final' response

The investigation found the first 'final' response to the Complainant was focused on the confidentiality of the discipline process, in accordance with the misconduct policy and the general approach taken by PathWest in managing the complaint.

The first 'final' letter did not advise the allegations had been substantiated or of the proposed staff refresher training. The PathWest Workforce unit reviewed the letter however Workforce reportedly does not have a formal role in reviewing the complaints process.

The Complainant's request for an amended response in accordance with the complaints policy reflects the acknowledgement letter from the then Minister for Health, which stated the complaint would be fully reviewed in accordance with the complaints policy. The second final response advised PathWest would implement staff training, which aligns with the broader intent of the complaints policy to improve organisational systems.

The second final letter was prepared with the support of the Health Industrial Relations Service (IR). The investigation observed that a review by IR (as occurs with the discipline process) is usually not required for complaint response letters. Given the nature of the issues considered in the complaint, it may have been relevant for the Executive Director, PathWest to consider the final response to the Complainant.

Commissioner's recommendations

- It is recommended that NMHS formally establish an independent check or review point for correspondence with complainants.

External review options

Both final responses advised that external review by HaDSCO was an option if the Complainant was not satisfied. Where complaints resolution is initiated by a complainant, HaDSCO generally acts as a negotiator or conciliator to agree outcomes, rather than an investigator of potential systemic issues.

It is suggested that, as the complaints policy recognises a number of external health complaint management bodies, including the Ombudsman WA, it may be appropriate for NMHS to advise complainants where they can also pursue actions through the Ombudsman.

Responsiveness

Given the receipt of the complaint on 11 March 2016, the complaint was open longer than 30 days. However, progress updates were provided at approximately 15 working day intervals, and the Complainant was advised of the delay, in accordance with the complaints policy.

The final decision (as per the discipline process) was made on 19 May 2016 and the first 'final' letter was sent to the Complainant on 2 June 2016. The investigation found this timeframe was reasonable in the circumstances.

Confidentiality training

The investigation observed that 69 per cent of PathWest staff have completed AEDM training in the last five years.

PathWest commenced developing refresher confidentiality training in late 2016 however this has been temporarily put on hold by NMHS due to the further complaint received from the Complainant.

The investigation observed that pathology samples and results handled by PathWest staff generally represent personally identifiable information. PathWest employees, similar to other health service professionals, may come across information that relates to people they may know, or know of, in the course of their work. It is not practicable to stop employees seeing all information for all names they might recognise. Therefore, ongoing awareness and education on the importance of patient confidentiality is essential. Given that training is intended to reduce the risk of a similar breach, refresher training is an important system improvement arising from this matter.

One suggestion arising from the interviews conducted as part of this investigation is that a clinician be designated available to discuss any ethical dilemmas in relation to employees becoming aware of personal information from known individuals.

Commissioner's recommendations

- It is recommended that NMHS require all PathWest staff to complete refresher AEDM training, within the next six months, that reinforces the importance of patient confidentiality.

Other actions taken

The initial risk assessment by PathWest was that such a breach could have 'major consequences'.⁴ The investigation established such a high risk rating was uncommon. Determining the risk level at the end of the process may have helped evaluate the appropriateness of the action taken in relation to the level of risk.

The investigation could find no evidence of an action plan for responding to this complaint. However, PathWest took more steps to respond than were advised to the Complainant. These actions, had they been advised, may have provided some additional level of comfort to the Complainant. The actions included:

1. A bulletin reminding staff of the importance of patient confidentiality was sent to staff by the PathWest Executive Director on 11 July 2016, following the conclusion of the complaint process.

⁴ PathWest recorded the highest consequence category of 'major consequences' for 'non-compliance'. This is described in the 2009 *WA Health integrated corporate and clinical risk analysis tables and evaluation criteria* as 'Deliberate breach or gross negligence. Significant harm. Formal investigation. Disciplinary action. Ministerial involvement. Serious misconduct.'

2. Additional guidance on confidentiality was added to PathWest's induction program in February 2017.
3. Most PathWest senior managers have since been trained in the misconduct management process.
4. PathWest managers reminded staff of their responsibilities in relation to patient confidentiality following discussion at management meetings.

Commissioner's recommendations

- It is recommended that NMHS ensure an action plan, with persons responsible and targeted timelines, is centrally recorded by PathWest for all complaints where systems improvements are identified.

Stage 4: Service improvement

The final stage in complaints management is service improvement. The investigation noted the key requirements for this stage are:

- the organisation is committed to improvement in complaints handling
- the action taken is monitored to ensure it is effective
- the complainant's satisfaction with the complaints process is tested
- the data collected is analysed at the highest level to help identify emerging trends and provide feedback to staff
- there is management review of the complaints process
- there is auditing of the complaints process.

The investigation did not identify any specific events for the complaint in relation to this stage although PathWest demonstrates a commitment to continual improvement in general. For example, the investigation found that complaints data is distributed to PathWest staff on a monthly to quarterly basis by the quality managers in order to improve practices and conduct.

The impact of the action taken to date to remind staff of the importance of patient confidentiality has not been tested. Changes in staff awareness could be monitored through PathWest's employee survey program. Alternatively, the action taken should be repeated to ensure staff are aware of their responsibilities.

Other than the final responses provided to the Complainant, which provided PathWest contact details, PathWest did not seek feedback on the Complainant's experience of the complaint resolution. The matter was assumed concluded by the Complaints Handling Officer when the Complainant thanked the Officer for the amended response. The complaints policy proposes a feedback survey, which would help identify at the earliest possible opportunity if complainants are dissatisfied with the management of their complaint.

Auditing and review are also important to assess the suitability of the complaints handling process in achieving objectives. The investigation did not determine how often these activities occur however they may be part of PathWest's quality management system and laboratory accreditation.

Commissioner's recommendations

- It is recommended that NMHS take steps to monitor the level of employee awareness in relation to patient confidentiality through its next employee survey.
- It is recommended that NMHS take steps to implement a complaint evaluation survey or form for PathWest, such as the example shown in the complaints policy toolkit.
- It is recommended that NMHS ensures a review or audit of PathWest's complaints handling process occurs on a regular basis if this does not already occur.

Part 2 – Misconduct management

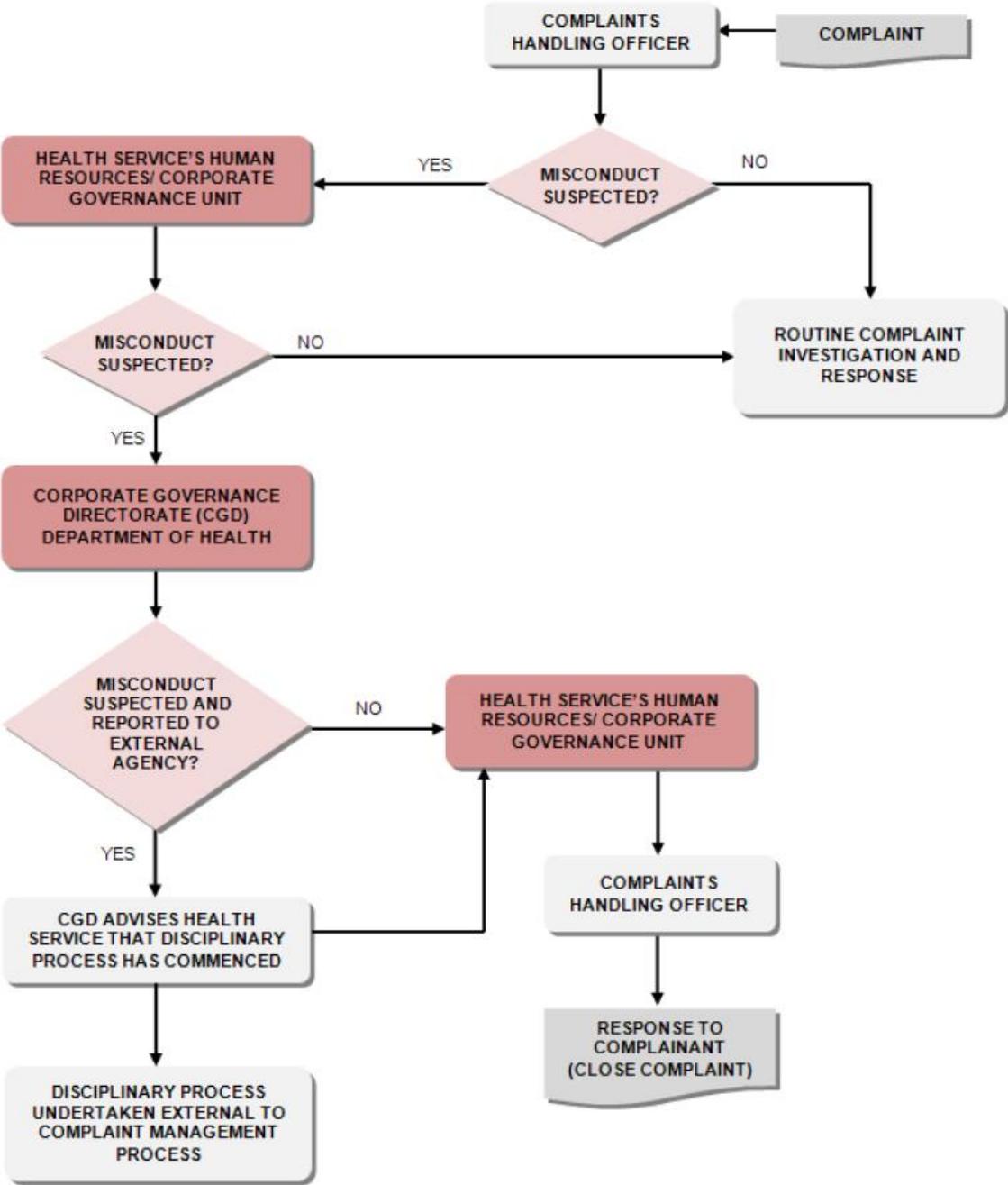
Complaints alleging misconduct

The complaints policy notes misconduct⁵ may be detected in reporting systems such as those for complaints management. Figure 2 shows the process followed where reasonable grounds exist to suspect a complaint concerns, or may concern, misconduct. This represents the process followed for the matter which is the subject of this investigation report.

If misconduct is suspected, a discipline process may commence external to the complaints process. This helps preserve the confidentiality requirements of the discipline process in accordance with the misconduct policy and the Commissioner’s Discipline Standard and reflects the rights and obligations of the employment relationship.

⁵ ‘Misconduct’ is defined in the complaints policy as including “misconduct reportable to the CCC, conduct where an employee disobeys or disregards a lawful order, conduct which contravenes any provision of the PSM Act or other relevant legislation...[or] conduct which contravenes a public sector standard, code of ethics, WA Health code of conduct or WA Health policy”.

Figure 2: The misconduct reporting process for complaints



Source: WA Health misconduct policy 2014

Phases of the misconduct process

For the matter under investigation, PathWest followed the misconduct policy,⁶ which has five broad phases:

- conducting the preliminary assessment of information
- dealing with a reasonable suspicion of misconduct
- commencing the discipline process
- conducting the discipline investigation
- concluding the discipline process.

In commencing the discipline process, an investigation of any response provided by a respondent may be required or it may be determined that a response satisfactorily addresses the allegations.

For this matter, the discipline process did not progress to a formal investigation by PathWest as the Respondent admitted to engaging in the suspected misconduct and an investigation was not deemed necessary.

The four relevant phases (less the discipline investigation) that comprise the misconduct management for this matter are described in this section of the report.

Phase 1: Preliminary assessment

The first phase in misconduct management is conducting a preliminary assessment of information. The investigation noted the key requirements for this phase are:

- alleged misconduct is reported to human resources
- human resources reports matter to the Corporate Governance Directorate (CGD) where reasonable grounds to suspect misconduct
- the line manager and human resources identify an appropriate decision maker
- the decision maker undertakes an assessment of the information available to establish reasonable grounds to suspect misconduct.

The key events associated with PathWest's preliminary assessment of this matter are outlined in the following table.

⁶ This policy applies where employees are not subject to the provisions of Part 5 of the PSM Act. Although a public sector employee, the Respondent was employed under the *WA Health – HSU Award 2006* and the *WA Health – HSUWA – PACTS Industrial Agreement 2014* at the time of the matter. This means PathWest was also not required to follow *Commissioner's Instruction No. 3: Discipline – general* in this matter.

Date	Event/action
14 March 2016	PathWest Workforce received the complaint from the Complaints Handling Officer as “probably misconduct”.
16 March 2016	Decision Maker 1 was nominated (senior leader in the Respondent’s work area) by the Complaints Handling Officer and PathWest Workforce.
17 March 2016	The assessment was drafted in part by PathWest Workforce, using a NMHS template, and completed by Decision Maker 1.
18 to 21 March 2016	The assessment was sent to CGD by PathWest Workforce. The disciplinary file and log was created at this time.
22 March 2016	The assessment was reviewed by CGD. CGD sought information on how the Respondent accessed the Complainant’s test results.
1 April 2016	PathWest Workforce met with Decision Maker 1 and recommended the decision maker be changed for perceived impartiality reasons, given the Respondent worked in Decision Maker 1’s department.
5 April 2016	The assessment was approved by CGD. CGD advised NMHS Workforce that the complaint was CCC reportable once finalised (‘category 3’) and WA Police would be notified by CGD.
6 April 2016	The assessment was completed by Decision Maker 2.
7 April 2016	The assessment by Decision Maker 2 was sent to CGD.

Reporting requirements

The Complaints Handling Officer appropriately referred the complaint alleging misconduct to the PathWest Workforce unit as the human resources representative for the misconduct process. PathWest Workforce acted as the case manager, including reporting to CGD as required by the misconduct policy (and the Department of Health’s 2007 *Operational Directive* on misconduct reporting), preparing correspondence and seeking advice as necessary.

The report to CGD resulted in an assessment that the matter was reportable to the CCC once finalised, as well as to WA Police by CGD as a possible breach of the Criminal Code.

Selecting a decision maker

The preliminary assessment was drafted in part by PathWest Workforce, including the risk assessment, complaint categorisation, action that may reduce the risk of misconduct, and factors for and against the use of the discipline process.

The Complaints Handling Officer and PathWest Workforce identified Decision Maker 1 in accordance with the policy and the Department of Health's 2013 *Authorities, delegations and directions schedule*, which provides authority for Tier 4 managers (and above) to initiate a discipline process and determine findings. The investigation established the Respondent's line manager was not involved in the selection of the decision maker due to the serious nature of the alleged misconduct.

The acknowledgement letter from the then Minister for Health advised the Complainant that Decision Maker 1, in tandem with the Complaints Handling Officer, would be involved in conducting a 'full review into the matter'.

Interviews conducted with PathWest staff during the investigation indicated that nomination of a decision maker considers whether relevant training has been completed, the decision maker's case load and any potential or perceived conflicts of interest.

Changing decision maker

Midway through the preliminary assessment phase, PathWest Workforce undertook to change decision makers. The record of the change states: 'Whilst your authority to make a decision is not in question, nor is the fact that you are at present impartial to the matter, [PathWest Workforce] recommended that the decision making responsibility be removed from yourself and given to [Decision Maker 2]. [Decision Maker 2] also has the authority to be a decision maker, and the fact that [Decision Maker 2] is removed from [the department] is important in delegating this role to [Decision Maker 2].'

The investigation could not establish what specifically triggered the change or any strong evidence that it was necessary. Although working in the same department, Decision Maker 1 was not the Respondent's direct manager. Decision Maker 1 has since left the organisation and was not interviewed during the course of the investigation.

Although PathWest had identified a need for Decision Maker 1 to be removed from the misconduct process, it is considered that this need was not fully met as Decision Maker 2 subsequently took advice from Decision Maker 1 in making a decision.

Commissioner's recommendations

- It is recommended that NMHS document the policy and process for identifying a decision maker in PathWest to ensure all relevant factors are taken into account.

Decision maker training

At the time of the matter, Decision Maker 2 had not previously undertaken the role of decision maker. Neither decision maker was specifically trained at that time in undertaking a misconduct process, but were provided with support materials and advice by PathWest Workforce.

It is noted that decision makers in PathWest generally come from science and medical backgrounds, which may mean some have less familiarity with administrative decision making. The potential risk of limited knowledge or awareness in this area has been

realised by PathWest, with most Tier 4 and above managers having recently been trained in the misconduct process and the principles of procedural fairness (including Decision Maker 2 and the Complaints Handling Officer in March 2017).

Commissioner's recommendations

- It is recommended that NMHS maintain PathWest's recently introduced practice of training decision makers in the misconduct process and relevant principles.

The assessment

Both decision makers reviewed and signed a preliminary assessment form drafted by PathWest Workforce and completed the section on whether there was reasonable suspicion of misconduct, the appropriateness of a discipline process, other action that could be taken and whether the Respondent needed to stand down or change duties.

The investigation found there was little difference in the two assessments completed. Decision Maker 1 noted that continued education and counselling on the issues surrounding patient confidentiality may help reduce the risk of misconduct and that this happens on regular occasions.

In comparison, Decision Maker 2 noted other action includes improved tracking of staff electronic access of patient results to ensure access is appropriate to an employee's clinical role. This will be introduced with the new Laboratory Information System in the next few years. Decision Maker 2 recorded that, in the interim, a memorandum to remind staff about their responsibilities with regards to patient confidentiality should be distributed.

Neither decision maker determined the Respondent needed to stand down or change duties during the misconduct process.

It is noted that neither assessment referred to the Complainant's other concerns that the Respondent may have accessed the Complainant's or other records without authorisation or divulged the information elsewhere. This may be because these allegations were speculative in nature with insufficient information (such as relevant dates). However, the investigation could not locate a record of any decision made (or rationale behind a decision made) not to investigate these claims. The Complainant was not contacted for further information in relation to the allegations.

The investigation found this lack of documentation for key decisions to be inconsistent with the expectations of the Discipline Standard in that decisions should be transparent and capable of review.

Commissioner's recommendations

- It is recommended that NMHS ensure that PathWest's assessment of, and response to, all misconduct allegations are fully documented.

Phase 2: Dealing with suspicion of misconduct

As per the misconduct policy, the second phase in misconduct management is dealing with a reasonable suspicion of misconduct. The investigation noted the key requirement for this phase, with respect to this matter, is:

- the decision maker determines to deal with the suspected misconduct under the discipline process as the most appropriate mechanism.

In this matter, the suspicion of misconduct was considered against two requirements of WA Health's code of conduct. These were:

- 'responsible care' – to maintain confidentiality of personal information that becomes available in the course of duties and only use the information in connection with duties and/or with proper authorisation
- 'ethical behaviour' – to behave in an ethical and professional manner at all times and not act in any way that brings WA Health into disrepute.

Both decision makers reported in the preliminary assessment that there was enough suspicion that the matter should be further investigated. A discipline process was considered appropriate by both if a breach had occurred, and it was determined to commence a discipline process.

Phase 3: Commencing the discipline process

The third phase in misconduct management is commencing the discipline process. The investigation noted the key requirements for this phase, with respect to this matter, are:

- the decision maker informs the respondent of the allegations
- the decision maker determines the respondent's response satisfactorily addresses the allegations.

The key events associated with PathWest's commencement of the discipline process in this matter are outlined in the following table.

Date	Event/action
16 March 2016*	Decision Maker 1 informally discussed the allegations with the Respondent's line manager and the way in which the Complainant's test results were seen by the Respondent.
12 April 2016	The Letter of Allegation (LOA) was prepared by PathWest Workforce and sent to Decision Maker 2.
14 April 2016	The LOA was signed by Decision Maker 2.
15 April 2016	The LOA was issued to CGD and the Respondent.
22 April 2016	The response to the LOA was received from the Respondent. The Respondent admitted to engaging in misconduct. Decision Maker 2 questioned whether ethically the Respondent had any other option other than to disclose.
27 April 2016	PathWest Workforce informally discussed with NMHS Integrity and Ethics (I&E) whether the Respondent had any option but to disclose.
29 April 2016	PathWest Workforce (in consultation with NMHS I&E) advised Decision Maker 2 that the decision does not require knowing whether the test results compelled the Respondent to disclose.
29 April 2016	Decision Maker 2 indicated intention to discuss with the Respondent's work area and PathWest Workforce requested this discussion be recorded.
2 May 2016	Decision Maker 2 discussed the matter with Decision Maker 1 (as the senior staff member in the area where the Respondent worked). Decision Maker 1 advised the test results "became known to [the Respondent] through [the Respondent's routine role]". Decision Maker 1 advised "no reason to suspect that [the Respondent] intentionally sought out" the results.

Note: * denotes an approximate date

The Letter of Allegation (LOA)

The investigation found that the Letter of Allegation (LOA) to the Respondent outlined two allegations relating to a single and specific matter of unauthorised disclosure. The LOA referred to the misconduct policy and the option to seek support, identified possible disciplinary actions and offered seven calendar days with which the Respondent could provide a response. This demonstrated procedural fairness in providing the Respondent with sufficient detail to enable an appropriate response.

The LOA also asked the Respondent to treat the matter as confidential in accordance with the misconduct policy and the expectations of the Discipline Standard. This

protected the presumption of innocence during the process and was reflective of the employment relationship.

More speculative allegations relating to the Respondent's unauthorised access of the Complainant's and other medical records had not been tested in preliminary assessment and were not put to the Respondent.

The LOA did not mention the Complainant's concern that the Complainant's information had been otherwise disclosed (e.g. on social media). However, the Respondent received a copy of the complaint as an attachment to the LOA. The Respondent advised in the response to the LOA that: "I told [the third party], and only [the third party], in trust. I certainly did not post said results on social media...nor did I inform anyone else."

Discipline investigation

A discipline investigation was not undertaken due to the Respondent's admission and the assurance sought by Decision Maker 2 from Decision Maker 1 that the Respondent had accessed the Complainant's information during the normal course of duties. It is not clear how Decision Maker 1 determined this to be the case as there is no record other than an email between the decision makers in which Decision Maker 1 states there is "no reason to suspect that [the Respondent] intentionally sought out" the results.

It is noted that Decision Maker 1 had been removed from the decision maker role to ensure impartiality, yet Decision Maker 2 referred to Decision Maker 1 and did not consult the Respondent's line manager or the Respondent. Decision Maker 1 spoke with the Respondent's line manager but this discussion was not documented.

Decision Maker 2 did not speak or meet with the Respondent as there was "no reason to believe the Respondent had deliberately accessed the test results". This determination relied on the Respondent's response to the LOA, the Respondent's employment history and the advice from Decision Maker 1, who had been removed from the decision-making responsibility.

The Discipline Standard requires a proper assessment of the facts and circumstances surrounding a matter. It may have been prudent to further investigate to formally verify:

- when the access and disclosure had occurred
- how the test results were accessed
- whether, on the balance of probabilities, the test results were disclosed more widely than claimed
- whether there had been any possible unauthorised access of other records.

The investigation observed PathWest's response to the allegations to be somewhat inconsistent with the preliminary assessment's risk rating of 'major consequences' and a potential breach of the Criminal Code.

Exception to the common law duty

The Department of Health's policy⁷ at the time was that, as a general rule, an individual's personal health information should only be disclosed to another person with the consent of the patient. This duty continues beyond the cessation of the professional relationship with a patient, including for non-clinical roles, and beyond the death of the patient.

Decision Maker 2 initiated a consideration of whether the Respondent felt there was any choice but to disclose information that might help protect the health of other parties. This consideration was more well-documented than the Complainant's right to privacy or the common law duty of patient confidentiality. The Respondent had raised the possible protection of health not as a defence but rather as an explanation of the misconduct in the response to the LOA, while acknowledging it was improper conduct.

Regardless, Decision Maker 2 decided disclosure was not the Respondent's decision to make and the Respondent "should have checked with a senior leader first about any decision to disclose". An independent and qualified person, such as a department head, could "appropriately weigh the issues".

The Department of Health's 2013 *Information Circular: Patient confidentiality*, which applied at the time, recommended that legal advice be sought as to the application of any 'public interest exception' to the duty of patient confidentiality prior to any disclosure being made.

Commissioner's recommendations

- **It is recommended that NMHS ensure PathWest's investigation approach, and the rigour applied in responding to allegations of misconduct, is commensurate with the seriousness of the suspected misconduct.**

Phase 4: Concluding the discipline process

The fourth phase in misconduct management (where a discipline investigation does not occur) is concluding the discipline process. The investigation noted the key requirements for this phase, with respect to this matter, are:

- the suspected misconduct is substantiated and the decision maker proposes disciplinary action
- the decision maker informs the respondent of the finding and proposed action
- the decision maker considers the response from the respondent and makes the decision
- the decision maker advises the respondent of the decision and action to be taken
- the decision maker reports the outcome to human resources and CGD.

⁷ 2013 *Information Circular: Patient confidentiality*

The key events associated with PathWest’s conclusion of the discipline process in this matter are outlined in the following table.

Date	Event/action
29 April 2016	PathWest Workforce (in consultation with NMHS I&E) provided options for sanctions and identified a 2015 NMHS precedent.
2 May 2016	Decision Maker 2 made the decision. Allegations were substantiated and a first warning proposed.
3 May 2016	NMHS I&E confirmed the sanction “appears to be a fair decision in the circumstances”.
3-4 May 2016	The Letter of Intent (LOI) was sent by PathWest Workforce to IR for review.
6 May 2016	The LOI was signed by Decision Maker 2 and sent to CGD and the Respondent.
19 May 2016	The response to the LOI was received from the Respondent. Decision Maker 2 confirmed the final decision.
30-31 May 2016	The Letter of Outcome (LOO) was prepared by PathWest Workforce for IR review. The LOO was signed by Decision Maker 2 and sent to the Respondent. A first warning was issued to the Respondent.
3 June 2016	The outcome of the discipline process was reported to CGD. The disciplinary file and register was closed and completed.
7 June 2016	CGD reviewed the case and noted the complaint was “inadvertently not reported” to WA Police.
8 June 2016	CGD confirmed through PathWest Workforce that the Respondent accessed the Complainant’s test results during normal duties and requested a record of the sanction decision. CGD signed-off the management review of the case.
13 June 2016	The Director General (DG) of the Department of Health notified the CCC about the serious misconduct based on a potential breach of the Criminal Code.
27 June 2016	The CCC wrote to the DG noting the action taken and advising no further action and file closure.

The Letter of Intent (LOI)

The investigation observed the LOI advised the Respondent of the proposed finding and action and offered seven calendar days to provide a response, prior to the decision being made. This continued the demonstration of procedural fairness.

Decision Maker 2 found the allegations were substantiated and moved to contemplate the disciplinary action to be taken.

Factors affecting the decision

PathWest staff consulted in the course of the investigation said the Respondent had an “unblemished record” and had been subject to no other discipline process during the Respondent’s employment. The Respondent was also recognised as contrite, keen to apologise and concerned about potentially protecting the health of the third party.

The explanatory notes to the misconduct policy suggest consideration of the following factors in making a decision for disciplinary action:

- whether the misconduct in question is an isolated act
- the employment history of the respondent
- the status and position of the respondent
- the current and future safety of patients and staff
- the reputation of the organisation and the Department of Health
- the impact on staff, the organisation and the Department.

The investigation observed Decision Maker 2 had taken many of these factors into account. However, the Respondent’s long employment history was treated as a mitigating factor rather than a reason why the Respondent should have ‘known better’ than to engage in serious misconduct.

Interviews of PathWest staff suggested there was insufficient weight placed on factors such as a possible criminal breach, any impact on public trust and confidence or PathWest’s reputation as a service provider. As previously mentioned in this investigation report, this was Decision Maker 2’s first time in the role of decision maker for a misconduct process. However, Decision Maker 2 acknowledged the ‘risk to an organisation’s reputation of breaching patient confidentiality’ during interview.

As previously suggested in this report, a rigorous investigation by PathWest may have served to give greater confidence in the view that this was an isolated act of misconduct and so the ‘current and future safety’ of patients, in relation to access and disclosure of confidential information, was assured.

The decision was also informed by a 2015 NMHS precedent, where a respondent in that matter received a first warning for a breach of patient confidentiality through the disclosure of medical information to another party.

Type of sanction

The Respondent was employed under the *WA Health – HSUWA – PACTS Industrial Agreement 2014* at the time of the matter. This specifies that if a fourth warning is received by an employee within 12 months of a third, the employer has the right to dismiss the employee. This procedure is intended to preserve the employee’s rights, but the Agreement states it shall not, ‘in any way, limit the right of the employer to summarily dismiss an employee for serious misconduct’. Verbal advice received from the Department of Health during the course of this investigation is that serious misconduct is conduct deemed serious enough to warrant immediate dismissal.

PathWest Workforce, in consultation with the NMHS Integrity and Ethics unit, in suggesting sanction options to Decision Maker 2 advised termination is “the most extreme action available...and would face significant challenges from IR and/or NMHS”. Other options included no action, first warning, and first and final warning.

Consultation with NMHS and PathWest during this investigation suggested that termination is seen as the “last resort”, applied in the “most extreme circumstances” and usually requires a precedent and authorisation by the NMHS Chief Executive in accordance with the Department’s 2013 *Authorities, delegations and directions schedule*.

The investigation found sufficient evidence that the sanction applied (a first warning) was appropriately authorised, given careful consideration and involved input from relevant parties, as well as reference to precedent. However, the sanction appears somewhat inconsistent with the information available to PathWest in determining a sanction. This includes:

- PathWest’s ‘major consequences’ risk assessment of the alleged conduct
- the Department’s recorded assessment of the alleged conduct (for reporting purposes) as ‘serious misconduct pursuant to section 4(c)⁸ of the *Corruption, Crime and Misconduct Act 2003*’
- the Department’s recorded intent to report to WA Police as ‘this allegation could breach section 81’ of the Criminal Code
- misconduct substantiated by PathWest.

The advice provided to Decision Maker 2 by PathWest Workforce, in consultation with NMHS Integrity and Ethics, noted a first warning was the lowest level of disciplinary action available and that it ‘may not provide an effective deterrent’.

⁸ Section 4(c) provides that ‘Misconduct occurs if...a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by two or more years’ imprisonment’.

In comparison, the advice provided for the option of a first and final warning noted the 2015 precedent of a first warning only, and highlighted the importance of a consistent approach.

Record keeping

The CGD review at the end of the process noted a record of the discussion between Decision Maker 2 and Decision Maker 1 would have improved the ability to review the process. A record of this discussion was found to exist during this investigation.

As previously stated in this report, it is recommended that PathWest ensure the response to allegations of misconduct is fully documented and recorded in the organisation's official records system.

Part 3 – Other matters arising

Declaration of confidentiality

The Health Support Services' 'new employment details' form (N2) requires, amongst other things, staff to sign a declaration that they will not divulge or use confidential information related to patients during or after their period of employment. Staff also undertake to notify their supervisor immediately if they become aware of any breach of privacy relating to information they access in the course of their duties.

It is noted that IR sought a record of the Respondent's declaration in reviewing the LOA and one could not be found. This investigation also could not locate a confidentiality declaration on the Respondent's employment file. However, the Respondent had a considerable length of service at the time of the complaint and conditions of employment may have changed in that time. The investigation established the Respondent had not since been requested to complete one.

This is an important systems improvement that should be actioned in response to the complaint. In support of this, the investigation observed some public organisations require staff to complete annual confidentiality agreements.

It is recognised that an annual agreement may not be practicable, but ensuring all staff have a record of signing a declaration, at least once, around patient confidentiality may help in making future determinations as to whether a breach is intentional.

The Department of Health's 2012 *Information security policy*, which applied at the time of the matter, states: 'WA Health entities must ensure that employees handling personal and confidential data have signed confidentiality agreements that clearly spell out their information security responsibilities, and the consequences of breaching confidentiality'.

Commissioner's recommendations

- It is recommended that NMHS audit the completeness and currency of the commitment that all staff make, as a condition of employment, to respect and protect patient confidentiality.

Data breach reporting

Policy requirements

The Department's 2014 *Data breach response policy* refers to personal health information incidents in which confidential information is viewed, shared, disclosed or used by an unauthorised individual, whether accidentally or intentionally. This would have been considered a mature policy at the time of the complaint.

The policy covers data held in any format or medium (paper-based and electronic) and includes collections of patient information. Examples in the policy include publishing of confidential information to the internet or social media, disclosure of staff contact details, loss of paper records containing personal information, or disposal of hard drives without the contents first being erased.

A 'data breach incident reporting form' should be completed by staff in instances of a suspected data breach. The first part of the form is to be completed immediately by the person who discovers the suspected breach. This requires an assessment of the impact severity. The second part of the form is completed by a data custodian, who assesses the risk of harm to WA Health, including the loss of public trust.

If there has been a suspected data breach by a member of staff, these should be reported as soon as practicable to the data custodian and must also be escalated, as appropriate, to the data steward. The data custodian is also to compile a report and circulate to relevant parties.

A related expectation of the 2014 *Information use policy* is that users of WA Health information do not disclose information to any other person who does not strictly require the information to undertake their business role, without prior written approval from the data custodian.

The complaint

The investigation identified that the data custodian for PathWest was unaware of the complaint at the time and no reporting form had been provided to the Data Custodian. However, the Data Custodian has recently discussed access controls with the PathWest Workforce Manager as a result of this matter.

The Data Custodian indicated the matter may not constitute a data breach as it is considered the Respondent had legitimate access to the confidential information and the misconduct occurred outside the workplace through the inappropriate use and disclosure of information. However, the data breach policy relates not only to access of information but also to unauthorised use and disclosure. The investigation also observed that the allegations that the Respondent may have engaged in unauthorised access of information were never fully explored.

The investigation observed the data breach policy to be important in supporting NMHS to contain, assess and respond to data breaches in a timely manner. It should help identify any systemic issues (such as training needs or technical upgrades to access controls).

Commissioner's recommendations

- Where relevant, it is recommended that NMHS ensure the *Data breach response policy* is implemented to mitigate any potential adverse impact on individuals and the organisation.
- It is recommended that NMHS ensure data custodians have comprehensive knowledge of relevant policies and their responsibilities under these policies.

Other reporting processes

The matter was assessed by CGD as category 3 'low level' serious misconduct, meaning notification to the CCC at the conclusion of dealing with the allegations. This is in accordance with the CCC's 2015 *Guidelines for notification of serious misconduct for principal officers* (Guidelines).

The letter of notification to the CCC advised the allegations were substantiated, a first warning had been issued and the matter was considered closed by NMHS 'pending any advice from the Commission'. The CCC received the letter, noted no further action and closed the file.

The CCC's Guidelines state that the duty to notify the CCC of a serious misconduct matter does not affect the requirement to comply with statutory obligations under any other Act, including reporting allegations to WA Police.

Notification to WA Police under section 81 of the Criminal Code was identified by CGD as a requirement during assessment for reporting purposes. Section 81 refers to the unauthorised disclosure of official secrets, including information in a record, and any communication by a public servant where the person is under a duty not to make the disclosure.

CGD's review at the end of the process shows a record of questioning whether notification should occur at that stage but the investigation could find no record of a report to WA Police or a decision by CGD not to report the matter.

Commissioner's recommendations

- It is recommended that potential breaches of the Criminal Code be notified to WA Police, subject to NMHS' and WA Police's current policy.

Customer service charter

The investigation found that PathWest does not currently have a customer service charter or standards. Vision and mission statements are available on the PathWest website and one of the core values is commitment to the health and wellbeing of the community.

There are customer service procedures in place for the hospital sample collection areas.

Commissioner's recommendation

- It is recommended that NMHS develop and publish a PathWest customer service charter that refers to the complaints process.

Offering an apology

Media coverage since the commencement of the investigation has suggested that the Complainant may have appreciated an apology from PathWest and the Respondent.

The investigation found the Respondent had initiated the offering of an individual apology in the response to the LOA by saying: "I am willing to apologise to [the Complainant] regarding this situation as I understand I have done the wrong thing by discussing [the Complainant's] results to [the third party]". The Respondent repeated the offer in the reply to the LOI with: "I still offer to apologise to the Complainant about this situation".

PathWest advised it had not facilitated the delivery of this individual apology due to the confidentiality of the misconduct process. Confidentiality is important for the presumption of innocence and the rights of a respondent. However, the Respondent was known to the Complainant and had admitted to engaging in the misconduct. An extension of the Respondent's apology in PathWest's correspondence with the Complainant may have gone some way to addressing the distress of the Complainant about the issue.

The *Civil Liability Act 2002* (CL Act) defines apology as an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgement of fault by that person. The Act provides that an apology expressed in this way does not constitute an admission of liability. Therefore, it should not be relevant to a determination of civil liability nor should it be admitted into evidence in court proceedings.

In accordance with the CL Act, the corporate apology that was provided stated: 'On behalf of PathWest, I [the Complaints Handling Officer] would like to express my sincere apologies that the health care provided to you did not meet your expectations'.

The Ombudsman WA's 2010 *Guidelines for remedies and redress* advise that, depending on the circumstances, it may be appropriate for an agency to acknowledge responsibility and express sympathy or regret. The complaints policy notes legal advice can be obtained from the health service's medico-legal unit and NMHS Medico-Legal Services was copied into the initial referral of the complaint to PathWest from the Minister.

The investigation considers that it may have been prudent for PathWest to seek legal advice around the provision of the apology in this matter, particularly given the Respondent's expressed willingness to make one and the personal nature of the breach of confidentiality.

Appendix 1 – Initial briefing to the then Minister for Health

FOR INFORMATION

Ref 25-513*4

BRIEFING NOTE

ISSUE

[redacted] emailed the Premier and Minister for Health with a complaint regarding an alleged breach of confidentiality

BACKGROUND

- On 7 March 2016, [redacted] emailed the Premier and Minister for Health with allegations of a breach of confidentiality by PathWest.
- On 14 March 2016, [redacted] reviewed the complaint under the *WA Health Complaints Management Policy*.
- The complaint has been assessed as a matter of suspected misconduct and will be progressed under the *WA Health Misconduct Policy*.
- The complaint was forwarded to PathWest Workforce for review and to commence the Misconduct Management process.
- [redacted] has requested that a proper investigation of her complaint be conducted and that she be informed of the outcome

CURRENT SITUATION

- It should be noted that there has been an interval of 19 months since the date of the alleged breach of confidentiality which may diminish the agency's capacity to investigate the complaint.
- [redacted]'s complaint is being managed by PathWest through the *WA Health Complaints Management Policy 2015*, from within which is provision for investigation of allegations of misconduct through the *WA Health Misconduct Policy*
- The complaint management process aims to be completed within 30 working days, however if there are any delays, PathWest will contact [redacted] directly to inform her of the progress at 15 day intervals
- At the conclusion of the investigation PathWest will communicate the outcome directly to [redacted]
- The Minister for Health will be briefed (via a further briefing note) upon the completion of the investigation

RECOMMENDATION/ACTION

For information

FOR INFORMATION

Ref 25-51314

Prepared by

Date 17 March 2016

Sign off Servano Palladino, Executive Director, PathWest

Date 17 March 2016

Sign off Director Office of the Chief Executive
On behalf of
Mr Wayne Salvage
A/Chief Executive
NORTH METROPOLITAN HEALTH SERVICE

Approved

Not Approved

Noted

Comments:

Signed
MINISTER FOR HEALTH

Date 29/3/16

Appendix 2 – NMHS Board Chair’s response to the draft report

NMHS was provided with an exposure draft of this investigation report and the request that any perceived errors of fact or omissions be identified. In responding to that request, Professor Bryant Stokes AM, NMHS Board Chair, thanked the Commissioner for his assistance in the matter and the opportunity to review the exposure draft. Professor Stokes also advised the Commissioner of a number of actions taken to address issues identified through the investigation.

The Board’s response is considered relevant in reporting on this matter and is described below.

The Board noted the report refers to the Complainant’s allegations that the Respondent may have accessed the Complainant’s or other records without authorisation. Mr Wayne Salvage, NMHS Chief Executive, has initiated an independent inquiry into any instances of the Respondent’s unauthorised access to personal information.

This review has also identified a range of opportunities for improvement of the discipline management approach in NMHS. A number of these changes have been implemented, including:

- Realignment of the structure of the NMHS Integrity and Ethics unit to report directly to the Executive Director Business and Performance.
- Reinforcing to the NMHS Executive Directors that patient complaints concerning staff conduct be managed through the discipline management process (rather than complaints process), and the reconfirming of the complaints process.
- Process commenced to review and update discipline management processes and approach in NMHS.
- Additional support being provided to PathWest Workforce staff in the management of misconduct matters.
- Systemic review of individual misconduct, with a summary of allegations being provided monthly to the Executive Director Business and Performance.
- The Executive Director Business and Performance undertaking independent review of all contentious or high risk misconduct.

References

The following instruments, policies and guidelines were referred to in conducting the investigation and preparing this report:

- Australian Commission on Safety and Quality in Health Care 2012, *National safety and quality health service standards*
- *Civil Liability Act 2002 (WA)*
- Corruption and Crime Commission 2015, *Guidelines for notification of serious misconduct for principal officers of notifying authorities*
- *Corruption, Crime and Misconduct Act 2003 (WA)*
- *Criminal Code Act Compilation Act 1913 (WA)*
- Department of Health 2015, *WA Health complaints management policy*
- Department of Health 2015, *WA Health complaints management toolkit*
- Department of Health 2014, *Data breach response policy*
- Department of Health 2014, *Information access and disclosure policy*
- Department of Health 2014, *Information use policy*
- Department of Health 2014, *Misconduct policy*
- Department of Health 2014, *Misconduct policy: Explanatory notes*
- Department of Health 2014, *Misconduct policy: Template letters*
- Department of Health 2013, *Authorities, delegations and directions schedule*
- Department of Health 2013, *Information Circular 0164/13: Patient confidentiality*
- Department of Health 2013, *WA Health risk management policy*
- Department of Health 2012, *Information security policy*
- Department of Health 2012, *WA Health code of conduct*
- Department of Health 2009, *WA Health integrated corporate and clinical risk analysis tables and evaluation criteria*

- Department of Health 2007, *Operational Directive OD 0036/07: WA Health misconduct – reporting*
- *Health and Disability Services (Complaints) Act 1995*
- *Health Services Act 2016*
- Ombudsman WA 2017, *Effective handling of complaints made to your organisation – An overview*
- Ombudsman WA 2011, *Complaint handling systems checklist*
- Ombudsman WA 2010, *Guidelines: Remedies and redress*
- Ombudsman WA 2009, *Guidelines: Good record keeping*
- Public Sector Commission 2014, *Public Sector Commissioner’s Circular 2009-27: Complaints management*
- Public Sector Commission 2012, *Commissioner’s Instruction No. 3: Discipline – general*
- Public Sector Commission 2012, *Commissioner’s Instruction No. 7: Code of Ethics*
- Public Sector Commission 2011, *Public sector standards in human resource management, ‘Discipline Standard’*
- *Public Sector Management Act 1994 (WA)*
- Standards Australia 2013, *AS ISO 15189-2013, Medical laboratories – Requirements for quality and competence*
- Standards Australia 2006, *AS ISO 10002-2006, Customer satisfaction – Guidelines for complaints handling in organizations*
- Western Australian Industrial Relations Commission 2014, *WA Health – HSUWA – PACTS Industrial Agreement 2014*
- Western Australian Industrial Relations Commission 2006, *WA Health – HSU Award 2006.*

