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CLIENT BULLETIN

PHOTOGRAPHS, X-RAYS, MEDICAL IMAGES AND PRIVACY

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In our current digital era, we have increasing access to instant, easy recording of images through mobile phones, as well as other digital media. The medical field is no exception. It is therefore important to recognise that there is no general right for medical practitioners to use patient photographs, x-rays or other visual images, whether for education, research or otherwise.

Current privacy legislation introduces a set of 10 National Privacy Principles, which establish the minimum standards for handling of personal information. Clinicians may be liable for fines of up to $100,000 if they store or distribute clinical photos incorrectly. A medical practitioner can only use or disclose health information for the purpose for which it was collected, **unless the individual's consent has been obtained** – and not doing so may have serious consequences. (Recent research undertaken at a Melbourne hospital* found that only a quarter of doctors surveyed had obtained appropriate patient permission to obtain clinical images.)

Use of clinical images for other purposes, such as education, without consent from a patient not only works against a sense of confidentiality for the patient, but may also have severe legal ramifications. Several recent cases illustrate this:

- An investigation has been carried out in Western Australia in relation to breach of patient confidentiality, after a newspaper published a photograph, obtained from a hospital's internal website, of a patient being treated at that hospital.
- A chief resident of general surgery at a USA hospital faces disciplinary proceedings after taking photos of a patient's tattoo, using his mobile phone.
- An apocryphal story tells the tale of a surgeon who objected, when his colleague included x-rays in his PowerPoint presentation at an educational conference, used x-rays of the first surgeon without his consent. The surgeon giving the presentation was the treating surgeon.

Property of medical imagery is different to that of normal documents – the right of ownership of these images is also accompanied by a duty of confidence. Taking or recording an image does not necessarily mean ownership of the image either – in the public sector these photographs may become both the property and responsibility of the hospital.

These obligations are not necessarily new. Doctors have always had an obligation to maintain confidentiality in relation to patients and patient information. A breach of privacy or confidentiality can also lead to a complaint of professional misconduct, and potential disciplinary proceedings before medical boards and authorities

Photographs and other medical imagery can be used for many useful purposes, and are included in patient records as an addition to clinical care – and may be displayed to colleagues, trainees and others for treatment purposes. However, any use beyond the treatment of the patient runs the risk of a breach of privacy. A breach of privacy or confidentiality can lead to a complaint of professional misconduct, and potential disciplinary proceedings before medical boards and authorities.

As technology improves into the future, clinical photography will also increase. It is important to be aware of the ramifications and consequences of using this imagery – and mobile apps such as the recently released PicSafe aim to guide medical practitioners in the safe usage and storage of such files.

It is also crucial to remember to gain the patient's consent before the images are used. The patient's consent should be recorded, and what the images will be used or potentially used for should be discussed with the patient. It is also acceptable under privacy legislation for a medical practitioner to have a Privacy Statement or privacy consent document (either signed by or given to the patient) which indicates that images may be used for research, training and education purposes – and allowing the patient to 'opt out' from this by indicating that such permission is not given. Practitioners operating in hospital environments should check their hospital's Privacy Statement or consent document to determine the extent of consent encompassed within these documents.

(* Research conducted by Dr David Hunter-Smith in the Department of Surgery at Peninsula Health found that only a quarter of doctors surveyed had obtained appropriate patient consent to take clinical images.)

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MAKING COMPLAINTS AGAINST HEALTH PRACTITIONERS – ARE YOU PROTECTED?

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Under the National Law dealing with registration of health practitioners, "complaints" can be made against health practitioners by patients, other health practitioners and anybody else with an interest in the complaint. There are also obligations to make a mandatory notification in certain circumstances.

The National Law contains provisions for strong protection against them for those who make a notification under the National Law, whether on a voluntary or mandatory basis.

A recent decision of the NSW Court of Appeal has tested the protections contained in the *Medical Practice Act 1992* in New South Wales ("**NSW Act**"). The provisions of the NSW Act are substantially different to those contained in the National Law. Whilst it was assumed that anyone who made a "complaint" under the NSW Act would be protected, the decision in *Lucire v. Parmegiani & Anor [2012] NSWCA 86* has determined that the protection is not as extensive as originally thought. The Court of Appeal has determined that the complainant in this case, who made a "complaint" to the NSW Medical Board, was not protected and now could potentially be liable for defamation. The matter is now to be re-heard, as to whether a claim for defamation will succeed or not. However, the Court of Appeal has determined that the defence of "absolute privilege" does not apply.

The decision of the Court of Appeal has been decided on quite specific provisions in the NSW Act. The NSW Act has been quite strict in determining the particular areas and conduct which will be protected from claim. Based on the facts in this case, the particular "complaint" was determined not to be "in the process of dealing with (the complaint) by assessment, referral or otherwise". Absolute protection from claim would only apply to communications made for the purpose of dealing with the complaint once it was made.

The decision is quite technical, and could well be confined to the particular facts and the particular provisions of the NSW Act.

The National Law, now applicable in all Australian jurisdictions, is a more extensive protection. Unlike the NSW Act, the National Law protects a person who, in good faith, makes notification under this Law. The National Law provides that such a person is not liable, civilly, criminally, or under an administrative process for giving the information.

Some commentators have suggested that the decision of the NSW Court of Appeal substantially weakens the protection for those who make a voluntary or mandatory notification to AHPRA or the Medical Board of Australia. That would be an over-statement. The provisions in the current National Law are substantially different from those which operated under the NSW Act and are formulated on a very different basis. It is, for example, absolutely clear that the protections given in Section 237 of the National Law apply to a person who makes a notification, which is a point of difference to that now interpreted as applying under the NSW Act.

The protection for people who make a complaint under the National Law still requires that the person who makes a notification does so "in good faith". This would not necessarily apply to someone who made a notification for an ulterior motive, such as to smear someone's reputation unduly, or who made a notification not believing the truth or accuracy of the material supplied. It is still open for the protection to be removed where the person making the notification is doing so vexatiously or maliciously.

So, to reassure those who wish to make a complaint under the current National Law, or who must make a mandatory notification under the National Law, it is doubtful that the recent decision in NSW detracts from the protections contained in section 237 of the National Law.

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