

## Legal considerations of consent and privacy in the context of clinical photography in Australian medical practice

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Clinical photography has become an integral component in the practice of medicine. It involves taking photographs of part or all of a patient, usually in the context of a visible abnormality, which may be at one point in time, or as a series to record the evolution of disease or healing processes. It saves time and reduces the impact of distance on conveying clinical information.

Over the past decade, the increasing utility of the internet and email, implementation of electronic health records, and widespread use of mobile electronic devices and smartphones have led to increasing use of clinical photographs for patient management, clinical education and research in medical practice. Visually oriented specialties in particular, such as dermatology, ophthalmology, surgery, radiology, pathology, intensive care, general practice and emergency medicine, use photography.

The advantages of clinical photography, however, have to be balanced against a medical practitioner's ethical and legal duty to respect a patient's right to privacy and confidentiality regarding their personal and health-specific information, as well as the patient's autonomy in determining how that information should be used. In the United Kingdom, it has been reported that only one-third of emergency departments where clinical photography is used have relevant policies in place, and of these only 5% have a written policy addressing consent for clinical and educational purposes.<sup>1</sup> In Australia and the UK, medical indemnity providers have identified the use or misuse of clinical photographs as an emerging medicolegal risk for the medical profession.<sup>2,3</sup> A recent article in the *MJA* highlighted the need for professional standards governing clinical photography, but did not provide any guidance or reference to the legal position of Australian clinicians who use it as a clinical tool,<sup>4</sup> which is essential if clinicians are to use it without necessarily compromising its benefits for patients and medical practitioners. Clinicians should be aware of what is required when obtaining clinical photographs, as well as the permissible uses of the photographs, particularly with respect to teaching and educational use, as well as research.

A clinical photograph may be, and is likely to be, considered part of a patient's medical record, even when stored electronically. Doctors should be aware of the applicable health records legislation within the state in which they practise, as they may be obligated to hold patient records — in most cases, for 7 years. This often extends

### Summary

- Clinical photography has become integral to clinical practice, especially in visually oriented specialties.
- Where a clinical photograph forms part of a patient's medical record, clinicians have a legal obligation to keep that photograph for several years, as determined by federal privacy legislation and various state legislation.
- Patients may be able to access their own clinical photographs in the context of freedom of information legislation.
- Consent to take clinical photographs must be informed consent, and clinicians have a legal requirement to only use the photograph for the purpose defined by that consent.

beyond the limitation period for commencing a negligence claim. The common law principle that previously existed, whereby a doctor or hospital's right of ownership of medical records extended to the right to refuse to show those records to a concerned party, has been overridden by freedom of information and privacy legislation. In Australia, under the *Privacy Act 1988* (Cwlth) as well as relevant state legislation, although a patient's medical records will generally be owned and possessed by a doctor or health care establishment, patients are entitled to have access to, take a copy of and correct their records. While not forgoing the clinical benefits of photography, doctors should keep in mind their legal obligations for storage and patients' access rights, and that stored information may be accessed for use in legal proceedings arising from patient complaints. The better the photographs and systems in place for use and storage, the better the evidence for the medical practitioner. Poor photographs with poor systems in place for use and storage may strengthen plaintiffs' potential proceedings.

Medical practitioners need to have regard for state and federal legislation when considering the use and disclosure of personal and sensitive information. Other health carers involved in a patient's management may have access to a patient's medical records, including photographs, and to obtain information about a patient's condition, and these provisions may vary between states and territories. Victoria, for example, is one state that provides for this in legislation.<sup>5,6</sup> When information is de-identified and not published or available for publication, this permission may extend to use in training staff. However, concerns have been raised that patients may still be identifiable by third

parties, for example, through physical characteristics of race and age or identifying marks such as tattoos and birthmarks, when the patient's name and specific details are not recorded on or with an image.<sup>7</sup> Medical practitioners and patients alike should be mindful of this. Furthermore, care should be taken with respect to appropriate electronic security to ensure confidential transmission of digital photographs. They should only be accessible to the clinicians involved in the patient's care, and care should be taken that they are not transmitted erroneously to third parties.

As determined by federal law, patient information (including photographs) should not be collected for inclusion in a record unless it is necessary for the purpose for which it is collected; and in such cases the patient must be informed or be aware beforehand not only of the reason for the collection of the information, but also to whom it is likely to be disclosed.<sup>8</sup> For example, a patient may give specific consent to photographs for clinical management by monitoring the evolution of a disease process, or for conveying clinical information to other members of their treating medical team. However, such consent would not necessarily apply to the use of the photograph for educating other colleagues. Thus, informed consent for the purposes of clinical photography should include an explanation of the purpose for which a photograph is to be used, and to whom the photograph is likely to be shown. Furthermore, where copies of clinical photographs are in the possession of third parties, the third parties should be aware of the limitations of use provided by the initial patient consent.

Medical practitioners should also watch with interest the progress of the Privacy Amendment (Enhancing Privacy Protection) Bill. The Bill, which was passed by both houses of federal parliament on 27 November 2012, is expected to take effect in April 2014 and may well have an impact on the handling of medical practice with regard to electronic information. Medical practitioners and their employers should appreciate that this area of law is a dynamic one and aim to stay abreast of changes in legislation when drafting their own policies and practices. Adding complexity, many states have their own specific legislation that must be read alongside the Privacy Act.

There is no one-size-fits-all solution to obtaining consent for clinical photography and to what can be done with photographs. In Australia, consistent with both state and federal law, consent must be actual and informed, and the product of a comprehensive discussion with the medical practitioner, free of coercion and made by a patient who has the capacity to do so. For consent to be lawful it must be more than a perfunctory signature at the bottom of a preprepared proforma. A reasonable approach to maintaining patient confidence and supporting patient autonomy is to obtain purpose-specific informed consent, preferably written, before taking photographs. It should be clear to the patients that they may revoke their consent at any time, and provision should be made to allow patients to do this. The use of clinical photographs should then be limited to the purposes outlined in the patient consent, whether it be for clinical, educational or research purposes.

The obligations we have described may be very difficult to meet in the context of a busy clinical setting, and may seem burdensome, considering that most clinical photographs are taken to further the patient's best interests. The Australian medical profession and legal system are facing the challenge of evolving with the same rapidity as the technology that has made clinical photography and electronic record sharing so integral to clinical practice today.

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