Contemporary Legal Issues for Operating Room Nurses

Rob Beetson
Group General Manager Corporate Governance
St Vincent’s Health Australia, 2014
1. The new Privacy Regime – What you need to know

2. Social Media - Protecting Yourself and Your Reputation

3. Complaints versus Civil Action – how to understand the jurisdictions impacting on nursing today.
1: The New Privacy Regime – What you need to know

The Privacy Act 1988 (Cth) and the 13 Australian Privacy Principles (APPs)

<table>
<thead>
<tr>
<th>The 13 APPs include</th>
</tr>
</thead>
<tbody>
<tr>
<td>APP 2: Anonymity &amp; pseudoanonymity</td>
</tr>
<tr>
<td>APP 3: Collection of solicited personal information</td>
</tr>
<tr>
<td>APP 6: Use &amp; disclosure of personal information</td>
</tr>
<tr>
<td>APP 10: Quality of personal information</td>
</tr>
<tr>
<td>APP 11: Security of personal information</td>
</tr>
<tr>
<td>APP 12: Access to personal information</td>
</tr>
<tr>
<td>APP 13: Correction of personal information</td>
</tr>
</tbody>
</table>
Protecting Yourself and Your Reputation
Social media [noun]

websites and applications that enable users to create and share content or to participate in social networking.

http://www.oxforddictionaries.com/definition/english/social-media
Social media communities refer to the group of people who have created, shared, and/or exchanged information and ideas in virtual communities and networks based on interests or needs.
Facebook recently claimed its Australian users have reached 9.15 million members – i.e. almost 42% of the population
Social media in health may be used for good such as:

- Patient education;
- Maintaining the therapeutic relationship;
- Support groups;
- Disseminating research and best practice;
- Gathering patient/client feedback.
Risks

• Comments on Social Media can be construed as nursing or medical advice rather than opinion;
• Support groups may attract factions or sub-groups that need to be managed;
• Unintentional breach of confidentiality or privacy by staff or other patients;
• Inappropriately dealing with the angry consumer response;
• Professional Boundary issues - therapeutic relationships becoming personal relationships.
Social Media - Risks to the Employer

• Patient confidentiality & privacy
• Staff confidentiality & privacy
• Staff security from harassment or intimidation
• Brand reputation
• Corporate information
• Trade secrets
• Intellectual Property
• General security
Social Media and the Individual - The State of Play

• Joe Bloggs is partying on and not going to work today! Woo hoo!

• Who has a problem with drowned towel heds [sic]. Not me.

• Domino's Employee Video Taints Food and Brand (North Carolina 2009) - Employees arrested for food tampering and subsequently sacked.

• Nurses sacked in the UK for tweeting pictures of themselves in lewd poses.
Work Life versus Private Life

• Social media/networking sites allow individuals to advertise their personal details and opinions on a myriad of subjects including their employment.

• Usage of social media outside of work can relate to your employment.

• At work, use responsibly and remember you are at work!

• Whether at or away from work, social media posts employees that disparage the employer, colleagues or inappropriately purport to represent the employer’s opinion may lead to legitimate disciplinary action if there is a relevant or close connection to employment.
Work Life versus Private Life

- Did the conduct occur during ordinary work hours?
- Did the employee use the employer’s IT systems to engage in the conduct in question?
- Did it occur via equipment provided or paid by employer?
- Did the communication specifically relate to events that occurred at work or between work colleagues?
- Has an express term of the employment contract been breached?
- Does the communication breach the employee’s implied duty of trust and confidence?
- Is the conduct likely to cause serious damage to the employment relationship?
- Does it damage the employer’s interests?
- Is it incompatible with the employee’s duties in some way?
“A Facebook posting, while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see ... It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences”.

Fitzgerald v Dianna Smith t/a Escape Hair Design [2010] FWA 735 at [52]
“Postings on Facebook and the general use of social networking sites by individuals to display their displeasure with their employer or a co-worker are becoming more common. What might previously have been a grumble about their employer over a coffee or drinks with friends has turned into a posting on a website that, in some cases, may be seen by an unlimited number of people. Posting comments about an employer on a website (Facebook) that can be seen by an uncontrollable number of people is no longer a private matter but a public comment.” Fitzgerald v Dianna Smith t/a Escape Hair Design [2010] FWA 735 at [50]
Social media is here to stay but protect yourself when using it:

Do not:

• disclose private or confidential information obtained through your employment.

• publicly criticise your employer on social media.

• act unlawfully (e.g. breaching copyright, harassing or discriminating against individuals) when using social media.
Social media is here to stay but protect yourself when using it:

Always:

• follow relevant organisation, department or professional policies including the Code of Conduct.

• make sure your personal online activities do not interfere with the performance of your job.

• be clear that your personal views are yours, and not the views of your employer.

• think of the web of a repository or archive for posterity – consider what you say before you say it!
Professional Regulation for the Protection of the Public

- Health Practitioner Regulation National Law Act (NSW)
- Health Care Complaints Act (NSW)

Both Acts are considered Public Protection Acts
Health Care Complaints Act 1993 (NSW)

Complaint against a health practitioner – following assessment the HCCC can:
• Discontinue the complaint
• Refer to the relevant professional council
• Refer the complaint to another body
• Refer to the Resolution Service
• Investigate under s13(1)
Health Care Complaints Act 1993 (NSW)

Following s13(1) investigation the Commission can:

• Terminate the complaint
• Refer to a Professional Council
• Make comments
• Refer to the Director of Public Prosecutions
• Refer to the Director of Proceedings
Health Care Complaints Act 1993 (NSW)

If the matter is referred to the Director of Proceedings the matter may be prosecuted in a:
- Professional Standards Committee or
- The relevant Professional Tribunal

At all times the HCCC consults with the relevant Professional Council.

Findings of unsatisfactory professional conduct or professional misconduct are based on the opinions of a peer of the person under investigation.
# Health Care Complaints Commission Complaints against Nurses

<table>
<thead>
<tr>
<th>YEAR</th>
<th>No. of Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008-09</td>
<td>254 complaints</td>
</tr>
<tr>
<td>2009-10</td>
<td>221 complaints</td>
</tr>
<tr>
<td>2010-11</td>
<td>227 complaints</td>
</tr>
<tr>
<td>2011-12</td>
<td>228 complaints</td>
</tr>
<tr>
<td>2012-13</td>
<td>392 complaints</td>
</tr>
</tbody>
</table>
Health Care Complaints Commission
Complaints against Nurses

In 2012-13 there were 392 complaints received.

- 124 complaints discontinued
- 3 complaints referred to the Commission’s Resolution Service
- 207 complaints referred to the Professional Council
- 45 complaints investigated by the Commission
- 2 complaints resolved during assessment
- 6 complaints referred to another body
Health Care Complaints Commission – Prosecuting complaints against nurses

Outcomes of prosecutions against nurses finalised in 2012-13

<table>
<thead>
<tr>
<th>Professional Standards Committee (12 cases)</th>
<th>Nurses Tribunal (13 cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reprimand &amp; conditions – 5</td>
<td>Registration cancelled – 8</td>
</tr>
<tr>
<td>Reprimand – 1</td>
<td>Suspension &amp; conditions – 2</td>
</tr>
<tr>
<td>Caution &amp; conditions – 1</td>
<td>Reprimand &amp; conditions – 1</td>
</tr>
<tr>
<td>Caution alone – 1</td>
<td>Conditions – 1</td>
</tr>
<tr>
<td>Withdrawn – 1</td>
<td>Withdrawn – 1</td>
</tr>
<tr>
<td>Dismissed – 1</td>
<td></td>
</tr>
<tr>
<td>Not proven – 2</td>
<td></td>
</tr>
</tbody>
</table>
Negligence and the Nursing Profession Principle 1 – the defendant owed the plaintiff a duty of care

“persons who are so closely and directly affected by my act that I ought reasonably to have had them in my contemplation as being likely to be damaged when I set out to do the acts or omissions which are now being complained of”.

*Donoghue v Stevenson [1932] UKHL 100*
Negligence and the Nursing Profession Principle 2 – that the defendant’s conduct on the occasion in question fell below the standard of care expected.

What and who determines the standard of care expected?

- Evidence from Professional Peers
- The Bolam test
- Section 50 of the Civil Liability Act 2002 (NSW)
- Professional Practice Standards (ACORN)
- Statutory Obligations
- Departmental Guidelines/Employer Policies & Procedures
- Academic Texts and Publications
- Patient Medical Records
Negligence and the Nursing Profession Principle 3 – that, as a consequence of the defendant’s breach of his or her duty of care to the plaintiff, the plaintiff suffered damage.

What constitutes damage?

Section 5 of the Civil Liability Act (NSW) defines:

- **Harm** – personal injury or death, damage to property or economic loss.
- **Personal injury** includes pre-natal injury and impairment of a person’s physical or medical condition, and disease.

There must be a causal relationship between the damage and the negligent act.
Negligence and the Nursing Profession Principle 4 – the damage complained of is a reasonably foreseeable consequence of the defendant’s negligent act.

What is foreseeable?

• Section 5D of the Civil Liability Act (NSW) considers causation, issues of remoteness and the scope of liability.
Negligence and the Nursing Profession

Pressure points for Operating Room Nursing and the issue of negligence

• Counting of instruments/sponges
• Consent
• Wrong site surgery
• Positioning of patient
• Acting outside of role/expertise
• Administration of medications
• Monitoring of patient
• Recording of nursing notes & operative processes
• Failure to use equipment properly