

*This publication is the first of the ANF (Vic Branch) Legal Advice for Members series prepared in response to Victorian Hospitals' Industrial Association's (VHIA) document prepared for Health Providers.*

*ANF (Vic Branch) LEGAL ADVICE FOR MEMBERS NO 1 provides information regarding the VHIA's advice to public health employers to take digital photos of employees engaged in industrial action (pages 15 - 16 of the VHIA guide).*

*We advise ANF members to read this information carefully and contact their ANF Organiser should their employer take employee photos without consent.*

## Unlawful Photography of Employees: VHIA Guide

Public health employers have been advised by the Victorian Hospitals' Industrial Association ("the VHIA") to take digital photographs of employees engaged in industrial action, and to send those photographs (with a description of the circumstances in which they were taken) to the VHIA (see pages 15 - 16 of the VHIA guide, 'Options and obligations in responding to industrial action, and right of entry obligations').

The *Information Privacy Act 2000* (Vic) ("the Act") applies to organisations including "bod[ies] established or appointed for a public purpose by or under an Act" (section 9(1)(e)) in Victoria. Part 3 of the Act (see particularly section 16) provides that such organisations must comply with the Information Privacy Principles ("the Principles") set out in Schedule 1 of the Act. The Act applies to public hospitals.

'Personal information' is defined in section 3 of the Act as "information ... that is recorded in any form ... about an individual whose identity is apparent, or can reasonably be ascertained, from the information ..."

A photograph constitutes personal information for the purposes of the Act and the Principles.

Relevant paragraphs of 'Principle 1 - Collection' of the Principles are as follows:

- 1.1 *An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.*
- 1.2 *An organisation must collect personal information only by lawful and fair means and not in an unreasonably intrusive way.*
- 1.3 *At or before the time (or, if that is not practicable, as soon as practicable after) an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure that the individual is aware of:*
  - (a) *the identity of the organisation and how to contact it; and*
  - (b) *the fact that he or she is able to gain access to the information; and*
  - (c) *the purposes for which the information is collected; and*
  - (d) *to whom (or the types of individuals or organisations to which) the organisation usually discloses information of that kind; and*
  - (e) *any law that requires the particular information to be collected; and*
  - (f) *the main consequences (if any) for the individual if all or part of the information is not provided.*

## Unlawful photography of employees

Photography of employees in the circumstances proposed by VHIA would not comply with the above paragraphs of the Principles. This would particularly be so where an employee expressly refuses consent to the photography.

The photographs are not necessary for the functions or activities of a public hospital (see paragraph 1.1), and photography of employees in the manner suggested in the VHIA guide would be unfair and unreasonably intrusive (see paragraph 1.2) if taken without consent.

Where information is “improperly or surreptitiously acquired”, a common law duty of confidence may arise in relation to that information (*ABC v Lenah Game Meats*). An employer bound by such a duty in relation to photographs of employees would be restricted in the use and disclosure of those photographs.

In light of the above a nurse would be entitled to refuse consent to being photographed and to take reasonable action to ensure they are not photographed without their consent.