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GENERAL PRACTICE SUPERVISORS AUSTRALIA

FAQ

FREQUENTLY ASKED QUESTIONS

WEBINAR

Identifying and Managing Medico-legal Risks

Reducing medico-legal risk entails understanding risks, and putting measures in place to safeguard yourself, registrar, practice and patients.

This resource aims to help you identify and manage medico-legal risks in your practice.

What are the responsibilities of a supervisor?

The Medical Board of Australia's (MBA) guidelines on supervised practice set out the following general responsibilities for supervisors:

- Ensure the supervised doctor is practising safely and not placing the public at risk.
- Address any problems that are identified.
- Observe the supervised doctor's work, conduct case reviews, and provide constructive feedback.
- Be clear about how a supervisor can be contacted during and after working hours.

What are the potential consequences of failing to identify medico-legal risks?

- Best-case scenario - near miss - no adverse consequences.
- Worst-case scenario - significant patient injury or death, resulting in:
  - a complaint, investigation by a statutory body, such as Australian Health Practitioner Regulation Agency (AHPRA) or the Health Care Complaints Commission (HCCC); and a disciplinary hearing,
  - potential claim for damages.
- Reputational damage to self and/or the practice.
- Adverse social or other media exposure.
- Employment issues.

What are the areas of potential exposure to medico-legal risks?

- Failing to check the skill level and competency of the registrar.
- Not making clear from the outset what procedures the registrar is/isn't able to perform.
- Failing to set out the criteria in which the registrar is required to contact the supervisor. For example,
  - Diagnostic - recognition of a seriously ill child.
  - Therapeutic - particular procedural skills.
- Providing inadequate supervision.
- Failing to recognise that some risks cannot be completely avoided.
- Not acting promptly when issues arise.

Can you provide some case studies of the types of medical legal risks that GP supervisors can face, and tips on how to manage these circumstances?

The following case studies give examples of action that could be taken to manage a medico legal risk arising from: inappropriate prescribing; boundary issues; failure to follow-up; and missed diagnosis.

The following five case studies are based on actual events, but details have been changed to protect the privacy of those involved.

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CASE STUDY 1 – Inappropriate prescribing

DR JO, GP1

- Dr Jo is doing her first GP registrar placement with your practice. Patients like her, but she has a problem with saying "No" when placed under pressure.
- You receive a call from the local hospital and are told:
  - One of your patients, Michelle, has been admitted following an overdose.
  - The ED registrar says that Michelle took too many oxycontin tablets which had been prescribed by her GP.
- You review the electronic notes and see:
  - Dr Jo gave Michelle a script for Oxycontin 20mg prn for a shoulder strain.
  - Nothing in the notes indicates an examination was performed.

What should you do?

MANAGEMENT:

- Discuss with Dr Jo:
  - What was her reasoning for prescribing Oxycodone?
  - Does she understand why this was inappropriate?
  - What factors does she believe contributed to her decision-making?
  - If she was faced with the same clinical situation, what would she do differently?
  - Does she need specific education regarding S8 prescribing?
  - Has she complied with the relevant statutory requirements?
- You should also tell Dr Jo that she needs to notify her medical indemnity insurer (MII) about what has happened.
- Phone your MII.
  - You are likely to have some involvement if aclaim or complaint is made by the patient.
  - The issue of making a mandatory notification should be considered.
  - Additional steps should be discussed. For example,
  - Do you need to undertake a review of Dr Jo's patient files?
  - Should her level of supervision be increased?
  - You can also discuss how you will approach the patient.
  - Should this be by phone, or in writing?
  - What should you say? Is it appropriate for you to apologise?
  - Is there anything you should NOT say. For example, *"I stuffed up?"*
  - What should you do if the conversation ends badly?
- Notify the training provider.

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CASE STUDY 2 – Boundary issues

DR DAVID, GP3

- Dr David is doing his final placement at your practice. He is very confident and has excellent clinical skills.
- Mrs Li comes to see you, saying:
  - Dr David has been seeing her 16-year-old daughter, Nicole, after hours at his home.
  - This has occurred on at least three occasions.
  - Nicole has been given several scripts for Xanax.
  - Mrs Li shows you a photo of a script which she has taken on her phone.

What should you do?

MANAGEMENT:

- Check the clinical notes.
  - Is there any evidence of Dr David's consultations with Nicole?
  - Has anything been direct billed to Medicare?
- Phone the local pharmacies.
  - Do they have concerns about recent unusual patterns of prescribing. That is, multiple scripts for Xanax?
  - If so, Pharmaceutical Services/Drugs and Poisons may need to be contacted.
- Ring your MII - You will need to have a lengthy discussion about what you need to ask Dr David and the action you should take, which may include the following:
  - Making a mandatory notification to AHPRA/ MBA.
  - Terminating Dr David's placement.
  - Notifying the training provider.
  - Contacting the Pharmaceutical Services/Drugs and Poisons for advice.
  - Reviewing files of a representative sample of patients seen by Dr David.
- conversations with your MII as further information comes to light:
  - You will need to discuss what to say to Mrs Li and her daughter, which would include the following:
    - Detailing the steps you have taken, such as contacting AHPRA and the Drugs and Poisons Unit.
    - Explaining that AHPRA and other bodies may contact them to discuss what has happened.
    - Offering to arrange referral for Mrs Li and Nicole to allied health practitioners or colleagues for support.

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CASE STUDY 3 – Failure to follow up

DR MIKE, GP 2

- Dr Mike is in his 2nd year of the GP training program and is in the final week of his rotation with you.
- Ruth is 54 years old and has chronic asthma.
  - Ruth comes to see Dr Mike with an acute exacerbation of her asthma.
  - Dr Mike prescribes Prednisone 25mg daily and asks Ruth to come back in a couple of days to see how she is going.
- Ruth has misunderstood Dr Mike's instructions and does not return to the practice for two weeks.
  - When she comes to see you, she asks for a refill of her Prednisone script.
  - She is still taking 25mg Prednisone daily.
  - Ruth also wants to discuss her sudden weight gain.
- Although Dr Mike's notes are sparse, you realise that Ruth has "slipped through the cracks" - her care has not been handed over or reviewed following Dr Mike's departure.

What should you do?

MANAGEMENT:

- Ideally, you would contact your MII for advice before talking to Ruth.
- Your MII can help you:
  - Plan the conversation
  - With a list of dot points you should cover.
  - With advice on what you should NOT say.
  - For example, it would NOT be appropriate to say, *"Dr Mike really stuffed up here - you are lucky you came to see me, or it would have been a lot worse."*
- You should be open and honest in your discussions with Ruth.
- The points covered during your consultation should include:
  - Her Prednisone dose should have been reviewed after a couple of days.
  - There seems to have been a breakdown in communication, as this message was not understood by Ruth.
  - Following Dr Mike's departure, Ruth's need for review was not followed up by the practice.
  - She has received a higher dose of Prednisone as a result.
  - You are very sorry this has occurred.
- It is important that you clearly explain to Ruth the following:
  - The treatment she will need to alleviate the effects of the prolonged course of Prednisone.
  - What actions you will be taking to facilitate this. For example, specialist referral.
  - The likely consequences of the higher dose of Prednisone for her, including best case and worst-case scenario.
- Ruth should also be offered the following:
  - A second opinion.
  - Transfer for her ongoing care to a colleague or new GP if she prefers.
  - Reassurance about steps that you/the practice are taking to ensure a similar event does not occur again.
  - The details of the practice principal or local complaints body if she wants to make a complaint.
- Finally, it is important that you contact Dr Mike to advise him of what has happened with Ruth.
  - Advise him to notify his MII.
  - You may also want to discuss these events with the training provider.

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CASE STUDY 4 - Missed diagnosis

DR LIAM, A GP REGISTRAR WHO IS SIX WEEKS INTO PLACEMENT AT YOUR PRACTICE

- You are on call one evening and are asked to go to Steven's home.
  - Steven is 65 years old and generally well, apart from being on Warfarin for a past RE.
  - The information provided by the answering service is that he is unable to get up from his chair.
- When you arrive, it is apparent Steven has unilateral weakness.
  - You call an ambulance and request he be transferred to hospital for further investigation.
  - Steven is subsequently found to have an acute chronic subdural haematoma.
  - The following day you review the notes.
  - You see Dr Liam has had two consultations with Steven during the last fortnight.
  - Steven has given a history to Dr Liam of headaches during the past several weeks.
  - Things are very stressful for Steven at present - he has recently separated from his long-term partner.
  - Dr Liam has documented that Steven had been feeling dizzy and unsteady on his feet, which he attributes to lack of sleep.
- Dr Liam considers the most likely explanation for Steven's presentation to be tension headaches.
  - He has recommended Steven try simple analgesics, such as Panadol, to see whether this helps his headaches.
  - A GP Mental Health Treatment Plan has been prepared so Steven can have counselling with a psychologist.
  - Steven has been advised to come back if his headaches worsen or his symptoms change.
  - A review appointment is scheduled for next week.

What should you cover during your discussion with Dr Liam?

MANAGEMENT:

- The content of your discussion with Dr Liam would ideally be planned and formulated with the assistance of your MII.
  - You will also need to have a discussion with Steven, which your MII can give you guidance with.
  - The content of your conversations with Steven could make a difference in terms of a future doctor-patient relationship, and whether a complaint or claim is made.
- Ask Dr Liam to talk you through his consultations with Steven.
- Explain what has happened.
- Encourage self-reflection.
- Analyse possible causes.
- Establish strategies to prevent recurrence.
- Advise Dr Liam to notify his MII.

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CASE STUDY 5 - The difficult trainee

DR OLIVIA, GP3

- Dr Olivia has almost completed her final six-month placement at your practice. Although she is at the expected standard, you have a number of concerns about her.
  - Communication style and ability to listen to patients.
  - Unwillingness to ask for help.
  - Selective interpretation and application of information.
  - Lack of insight and learning from past mistakes.
- You sit down with Dr Olivia to give her some constructive feedback, however your discussion does not go well.
  - Dr Olivia accuses you of bullying and harassing her.
    - After walking out, she emails you to say she is taking stress leave.
    - Further, she says she will not be returning to your practice for her final two weeks, but will collect her belongings and return her keys on the weekend.
  - You notify the training provider and take over the patents booked in to see Dr Olivia over the next fortnight Dr Liam considers the most likely explanation for Steven's presentation to be tension headaches.
- Six weeks later you receive a letter from AHPRA asking you to respond to a complaint about bullying and harassment which has been made about you by Dr Olivia.
  - Dr Olivia has also alleged in the complaint that you may be impaired.
- A patient also brings in a letter she has received from Dr Olivia, encouraging her to consult Dr Olivia at the new practice she is opening across the road from your practice.

WHAT SHOULD YOU DO?

MANAGEMENT:

- Phone your MII for advice.
- Send your MII:
  - A copy of the complaint.
  - Any documentation you have regarding your discussions with Dr Olivia, ideally with a detailed chronology of events.
- With your MII's assistance, an appropriate response to the complaint will be prepared and submitted to AHPRA.
- Depending on the cover offered under your policy, or your practice's policy, your MII may instruct solicitors specialising in employment law and/or intellectual property to provide you with formal
- You should also ask your MII whether they can assist you with the following issues:
  - Dr Olivia setting up her own practice in close proximity to yours, and writing to patients to entice them away from your practice.
    - Depending upon the contractual relationship, a restraint of trade clause may exist.
    - It is possible Dr Olivia may have improperly accessed and copied information from your practice records (for example, patient address details), thus breaching patient privacy and confidentiality.

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What are the new mandatory reporting obligations for data breaches?

- The *Privacy Amendment (Notifiable Data Breaches) Act 2017 (Cth)* came into effect on February 22, 2018.
- An eligible data breach happens if:
  a) there is unauthorised access to, unauthorised disclosure of, or loss of, personal information held by an entity; and
  b) the access, disclosure or loss is likely to result in serious harm to any of the individuals to whom the information relates.
- Amendment applies to all private health service providers.
- An entity must give notification if:
  a) it has reasonable grounds to believe that an eligible data breach has happened; or
  b) it is directed to do so by the Office of the Australian Information Commissioner (OAIC).

Who should my practice notify if there has been a breach of mandatory data obligations?

1. Individuals who have suffered the data breach.
   - Notify all individuals (option 1).
   - Notify only those individuals at risk of serious harm (option 2).
   - Publish notification (if options 1 or 2 are not practicable).
2. Office of the Australian Information Commissioner (OAIC).

What steps should be taken to notify individuals, and what needs to be included in the statement?

You can use any reasonable method to notify individuals. The general rule is to reach them in the same way as other communications. For example, if your practice normally sends out letters or emails, that should be your method of contact if notifying individuals of a data breach. If that is not practicable, a notice can be placed on your website or other form of social media.

Your statement must include the following:

- Your organisation's identity and contact details.
- A description of the data breach.
- A description of the personal information involved.
- Recommendations to individuals about steps they should take to minimise the impact of the breach.

A similar statement is required for the OAIC notification.

What steps should be taken to publish an online notification?

- Ensure the web page on which the notification is placed can be located and indexed by search engines.
- Publish an announcement on your social media channels.
- Take out a print or online advertisement in a publication or on a website reasonably likely to reach individuals at risk of serious harm.

What is an example of a data breach?

An example could be patient records being found in a dumpster, meaning personal information has the potential to be found, or shared with people it was not intended for. For example, hackers and perpetrators of ransomware attacks.

How can our practice protect itself against data breaches?

Keeping data safe requires taking exceptional care of the following:

- Governance, culture and training.
- Internal practices, procedures and systems
  - Email and SMS.

1. ICT and Access security.
2. Third party providers (including cloud computing).
3. Physical security of documents.
4. Destruction and de-identification of documents.
5. Standards you keep in place.

For more information, visit https://www.oaic.gov.au/agencies-and-organisations/guides/guide-to-securing-personal-information

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How does publication of a notification of a data breach not reveal a further breach of privacy?

Care must be taken in the wording of the notification to ensure no further breach of privacy.

For example, *"If your data was held by this organisation, we need to warn you there has been a breach…"*

Or, *"If your data was held by this organisation, we need you to contact us because there has been a breach and we can assist you."*

What medical legal risks do we need to be mindful of in the space of E-health, telehealth and My Health Record?

Australia's National Digital Health Strategy is an evolving area which meets the care of modern Australia. Essentially the MBA stipulates that *Good Medical Practice Guidelines* is equally as valid in technology-based consultations/care as face-to-face consultations. Privacy and consent remain vital.

What do I need to teach my registrar about telehealth?

You need to stress the importance of remaining as thorough in their electronic medical practice as required in a face-to-face consultation. Teach the importance of continuing to adhere to the rules of privacy, consent, security and documentation.

The patient medical record should include the notations:

- 'VC' (video call) or similar.
- Patient location.
- Other persons present.
- Initial or follow-up consult.
- Usual assessment/plan/treatment information.

For more information, see:

- Medical Board of Australia *Guidelines: Technology-based Patient Consultations.*
- AMA Position Statement: Technology-based Patient Consultations.

Is a doctor compelled to open and look into a patient's My Health Record when seeing the patient and noticing they have one?

No. But, why wouldn't you? If the My Health record (MHR) is available and has information that may be relevant to your consultation, why risk missing something which could lead to some sort of criticism in the future? However, it is a clinical decision for yourself whether to open the record, and you may be influenced by what you are seeing the patient for.

Do doctors need consent the first and every subsequent time they access a MHR?

Initially yes, and it is recommended you ask for consent each time a new document is uploaded.

Does the MHR form part of a record for the purposes of a subpoena?

Generally, no. You are not required to print-out and forward the MHR because it is not a record that you have control over: the patient has control over the MHR.

However, if you download and print a record or form from MHR and put that in the patient record, then that becomes part of the record which you are required to supply as part of the subpoenaed documents.

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What advertising and social media rules does my clinic need to comply with?

GPs must conform to National Law and Advertising Guidelines issued by the MBA. You must also conform to relevant consumer protection laws, and of course the MBA's *Good Medical Practice: Code of Conduct.*

Generally speaking, you must ensure:

- The information you publish about your medical services is factual and verifiable.
- Only make justifiable claims about the quality and outcome of your services in any information you provide to patients.
- Do not guarantee cures.
- Do not exploit patients' vulnerabilities and fears about their future health, or raise unrealistic expectations.
- Do not offer inducements or testimonials.
- Do not make unfair or inaccurate comparisons between your services and those of your colleagues.

Section 133 National Law states:

"A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that:

a) is false, misleading or deceptive or is likely to be misleading or deceptive; or

b) offers a gift, discount or other inducement to attract a person to use the service or business, unless the advertisement also states the terms and conditions of the offer; or

c) uses testimonials or purported testimonials about the service or business; or

d) creates an unreasonable expectation of beneficial treatment; or

e) directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services."

For detailed information about advertising guidelines, see: https://www.ahpra.gov.au/Publications/Advertising-resources/Legislation-guidelines/Advertising-guidelines.aspx

Who is responsible for signing off on advertising?

Practice managers, staff and an advertising agency may prepare or co-ordinate advertising, but the medical practitioner has ultimate sign-off, and therefore has responsibility. Advertising entails all forms of printed and electronic media which promotes a regulated health service and incudes any public communication using:

- TV
- Radio
- Newspapers, books, magazines
- Internet
- Social media

What are some examples of advertising breaches?

Examples of advertising breaches include:

- Use of "before" and "after" photos.
- Use of testimonials, for example on your website.
- Include names of prescription medication (breach of therapeutic goods legislation).
- No warning statement for surgical procedures.
- Misleading academic titles or memberships.

How do we safeguard our practice from advertising breaches?

Measures you can put in place include:

- Do not encourage anyone to leave testimonials on websites.
- Make sure the information in your advertisement does not encourage unnecessary use of your services.
- Check you do not use words such as "infallible", "unfailing", "magical", "miraculous", "a certain guarantee", "sure cure".
- Interact online in the same way you would in person.
- Keep yourself up-to-date with advertising guidelines, the code of conduct and other guidelines published by the MBA.

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With social media challenging the concepts of public and private life, how can GPs, their registrars and other health professionals use the medium?

Role model and remind your registrar that inappropriate use of social media can lead to boundary breaches.

Remind your registrar the MBA Good Practice Guidelines state:

"Professional boundaries are integral to a good doctor-patient relationship. They promote good care for patients and protect both parties."

With this in mind, health professionals' who use social media need to abide by the following:

- Comply with AHPRA Social Media Policy.
- Comply with confidentiality and privacy obligations.
- Present information in an unbiased, evidence-based context.
- Do not make any unsubstantiated claims.

If you do not abide by the above social media conditions, you risk:

- Breach of AHPRA advertising guidelines, ACCC and Therapeutic Goods Administration (TGA) requirements.
- Defamation.

What are testimonials and what rules apply to them?

Testimonials are not defined in the legislation, and have the ordinary meaning of "positive statement about a person or thing". This includes "recommendations, or statements about the clinical aspects of a regulated health service".

You must take heed of these advertising rules:

- You cannot use or quote testimonials on a site or in social media that is advertising a regulated health service, including patients posting comments about a practitioner on the practitioner's business website.
- Practitioners are not responsible for removing (or trying to have removed) unsolicited testimonials published on a website or in social media over which they do not have control.

What are the penalties for breach of advertising requirements?

If you fall foul of the requirements of the National Law or the Code of Conduct in relation to advertising, penalties can include:

- Criminal offence.
- Court may impose penalty – up to $5000 for an individual; up to $10,000 for a body corporate.
- Area of interest for the Australian Competition and Consumer Commission (ACCC).
- Complaints about unprofessional conduct made to Australian Health Practitioner Regulation Agency (AHPRA).

Increased AHPRA and HCCC focus on your advertising could result in:

- Investigation of practitioner's conduct.
- Imposed conditions.
- Disciplinary actions in a panel or tribunal.
- Prosecution of advertiser of a regulated health service.

What do I need to adhere to, and teach my registrar to also abide by, in regards to online professionalism?

Role model and teach your registrar the following:

- Online actions by or about doctors reflect on the individual doctor and the profession.
- Always check whether your online content is publicly appropriate. Advise your registrar to "pause before you post".
- Strongly avoid online network relationships with patients (past and present).
- Make privacy settings as tight as possible on Facebook and other media.
- Know the policies of your organisation. For example, internet usage, professionalism, and harassment.
- Always acknowledge conflicts of interest.

Does this resource need to be updated? Contact GPSA: P: 03 5440 9077, E: ceo@gpsupervisorsaustralia.org.au, W: gpsupervisorsaustralia.org.au
GPSA is supported by funding from the Australian Government under the Australian General Practice Training Program 21/03/21