

<b>Recording NHS staff in health and social care settings</b>	<b>Policy Register No: 18014 Status: Public</b>
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Developed in response to:	Trust Requirements Best Practice
Contributes to CQC Outcome	4,6, 7 and10

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<b>Policy to be followed by (target staff)</b>	All Staff
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## **1.0 Purpose**

1.1 The purpose of this policy is to ensure:

- That staff are aware of the legal rights of both staff and patients who wish to record their medical consultations or treatments through the use of portable recording devices on NHS premises or at home, including both overt and covert recordings, either with or without the knowledge or permission of those being recorded.
- That under no circumstances the personal safety and wellbeing of all parties is compromised

1.2 This policy informs staff about when recording is clearly not being used for legitimate purposes but intended to be used as form of abuse or threats and intimidation to staff.

1.3 This policy contains information on the management and guidance to staff in relation to patients who wish to record their medical consultations or treatments through the use of portable recording devices on NHS premises or at home, including both overt and covert recordings both with and without the knowledge or permission of those being recorded at all Mid Essex Hospital Services NHS Trust sites and service users' property.

## **2.0 Introduction**

2.1 This policy is based on NHS PROTECT's guidance on Patients recording NHS staff in health and social care settings, dated May 2016.

2.2 Unlike medical professionals, who are expected by the General Medical Council to obtain patients' consent to make visual or audio recordings, patients do not need the NHS professional's permission to record a medical consultation or treatment. Patient recordings which are made either covertly and overtly in order to keep a personal record of what the NHS professional said are deemed to constitute personal 'note taking' and are therefore permissible.

## **3.0 Scope**

3.1 This policy applies to all patients, relatives and visitors who wish to or engage in recording both audio and visual images of trust staff whether overt or covert in their actions.

3.2 This policy covers both overt and covert recording and both video and audio recording of medical consultations or treatments through the use of portable recording devices or CCTV on NHS premises or within the patient's own home.

3.3 This policy also covers patients who covertly record their consultations in their own homes using a hidden camera or mobile device and without the knowledge or permission of those being recorded.

## **4.0 Responsibilities**

### **4.1 Chief Executive**

The Chief Executive has overall responsible for the health, safety and welfare of persons on premises.

### **4.2 Security Management Director (SMD)**

- The Director of Estates & Facilities Management is nominated as the SMD.
- The SMD will ensure compliance with this policy on behalf of the Chief Executive.
- The SMD will provide support and guidance at Executive Level for matters relating to Security and Welfare of Trust employees, service users and visitors.

### **4.3 Local Security Management Specialist (LSMS)**

- The Trusts LSMS is responsible for monitoring the effectiveness of this policy. This will be carried out as an ongoing process and the policy will be subject to a three year review or earlier if required.
- The LSMS will be the point of contact to provide further advice as incidents may lead to other sanctions and legal, police or safeguarding involvement.

### **4.4 Medical Staff**

- Medical staff should be aware of and familiarise themselves with the guidance issued by the Medical Ethics Department of the British Medical Association in relation to patients wishing to record consultations and meetings with medical staff.
- Medical staff must warn any patients wishing to record consultations or meetings of the notes documented in the 'Recordings' section of this policy.

### **4.5 All Staff**

- Staff are responsible for complying with this policy and behaving in an appropriate way in relation to Patients recording NHS staff in health and social care settings.
- Staff must warn any patients wishing to record consultations or meetings of the notes documented in the 'Recordings' section of this policy.

## **5.0 The Law**

### **5.1 Overview**

- There are no specific legal requirements that govern an individual making a personal recording of their medical consultation or treatment, either overtly or covertly, for their private use. Recordings made to keep a personal record of what the NHS professional said are deemed to constitute 'note taking' and are therefore permitted when undertaken for this purpose. While a patient does not require permission to record their consultation, common courtesy would suggest that permission should be sought by the patient in most cases.

- The content of the recording is confidential to the patient, not the doctor or healthcare staff. The patient can waive their own confidentiality as they wish; this could include disclosing the details of their consultation with third parties or even posting and/or sharing the recording in unadulterated form on the internet through social media sites.
- The position may, however, change once a recording is no longer used as a record of the consultation, for example where the recording is disclosed or publicised in a modified way which is not connected to the consultation. This could include an instance where it is designed to cause detriment to or harass another individual captured in the recording. Any such disclosure or publication, depending on the nature and context, may attract a civil action for damages and may also be a criminal offence.

### **General Data Protection Regulations (GDPR)**

The recording of a consultation is likely to constitute processing of personal data under the DPA and as such it has to comply with the provisions of the GDPR. There is an exemption in the DPA where personal data is processed by an individual for their own personal purposes. In such cases, the 'processing' does not engage the data protection principles of the act (the 'domestic purposes' exemption). However, further processing of the data would have to comply with the DPA.

### **Potential legal action**

If any part of a covert or overt recording of the patient's consultation or members of the public, visitor and relatives, is disclosed to a third party without the prior consent of the other recorded parties, then depending on the nature and the context of such disclosure, a criminal offence may be committed, civil legal action may be taken, or a breach of the GDPR may occur.

## **5.2 Criminal offences**

- Criminal offences could arise from unauthorized disclosure of recordings, depending on how that disclosure or publication is made. However, the most likely offences could include an offence contrary to section 1 of the 'Protection From Harassment Act 1997', an offence contrary to section 4, 4A or 5 of the 'Public Order Act 1986', an offence contrary to section 1 of the 'Malicious Communications Act 1988' or an offence contrary to section 127 of the 'Communications Act 2003'.
- **Protection from Harassment Act 1997**  
It is an offence under the Protection from harassment act 1997 to cause distress and upset to an individual if knowing that such action will cause distress and upset. This could apply if any individuals use the act of recording with the know intention to cause distress and upset.
- **Criminal Justice and immigration Act 2008**  
If an individual is clearly recording with the intention to cause a nuisance then they may be committing an offence under the 'Criminal Justice and Immigration Act 2008' (section 119). This applies to persons who are not seeking medical advice, treatment or care could commit the offence if they, for example, use a mobile phone in such a way as to cause a nuisance or disturbance to an NHS

staff member and where they fulfil the other elements of the offence (subject to certain safeguards set out in the act).

- **Defamation**

Actions for libel can be brought in the High Court for any published statements which are alleged to defame a named or identifiable individual (or individuals'; under English law companies are legal persons, and allowed to bring suit for defamation) in a manner which causes them loss in their trade or profession, or causes a reasonable person to think worse of him, her or them. A statement can include an implication; for instance, a photograph or image in a particular context (for example, a photograph with an accompanying headline implying wrongdoing or incompetence) could be held as a personal allegation about the individual featured in the photograph.

This list is not exhaustive and the specific offence charged would depend on the facts.

## **6.0 Recordings**

### **6.1 Overt patient recordings**

Although we cannot place restrictions on a patient wishing to record notes of a consultation or conversation with a health professional, where it is felt absolutely necessary by the patient to do so, we should ensure that:

- any recording is done openly and honestly
- the recording process itself does not interfere with the consultation process or the treatment or care being administered
- the patient understands that a note will be made in their health record stating that they have recorded the consultation or care being provided
- the patient is reminded of the private and confidential nature of the recording and that it is their responsibility to keep it safe and secure
- any recording is only made for personal use
- patients are aware that the misuse of a recording may result in criminal or civil proceedings
- Patients are discouraged from undertaking recordings in the first place, unless it is deemed absolutely necessary by highlighting the above responsibilities.

### **6.2 Covert patient recordings**

Although we cannot place restrictions on a patient wishing to covertly record a consultation or conversation with a health professional, where organisations are aware that covert recording is a significant issue they should aim to discourage patients from doing so by ensuring that:

- the organisation promotes the open and honest recording of consultations, where a patient deems it absolutely necessary (see the advice above, which applies equally to covert recording)

- patients are aware that the organisation takes proactive steps to investigate and address any issues regarding the patient's treatment and care, to avoid them feeling it necessary to record their consultation
- relevant staff should consider providing patients with a written record summary, and or a verbatim record (if practical) of their consultation for their own personal use
- patients are advised that they are entitled to see their notes, if they so wish, by informally asking the healthcare professional in charge of the consultation, or to request a paper copy of their medical notes formally through a Subject Access Request (SAR) made under the General Data Protection Regulations May 2018. An application form is available on the Trust website.
- patients are given information on how they can complain if they have an issue with their treatment and care, and their attention is drawn to the relevant guidance from the Care Quality Commission and Information Commissioner's Office.

### **6.3 Recording of images in the hospital setting**

- The public and patients are not allowed to film or take pictures anywhere within the clinical hospital setting without prior agreement with the manager of the area, this includes all ward and clinic areas. Any agreed filming or pictures taken must be supervised to ensure no peripheral individuals are captured in recordings.
- The Trust has a duty to safeguard patient's and staffs privacy and dignity and therefore any such actions involving the filming or picture recording should be stopped and images deleted.
- If individuals refuse to stop filming or delete images after being asked to the individual should be told that they will be reported to the police and criminal sanctions will be sort. They will also be subject to immediate exclusion from Trust premises and further permanent exclusions may be applied. These individuals must be told that if they publish images or share with a third party in any way they will be committing a criminal offence and the Trust will take legal action.
- If such unauthorised filming actions become aggravated security must be called and also the police as necessary.

### **7.0 Audit and Compliance with Policy**

- This policy will be audited by the LSMS and clinical operations manager on an annual basis. This audit will look at Datix recorded incidents where ward staff reported non-compliance with this policy.
- Recording Incidents relating to persons under arrest or prisoners will be reviewed to ensure compliance with the agreed policy.
- Reports on incidents and the outcome of audits will be sent to the Health and Safety Group as appropriate.

## **8.0 Communication**

8.1 The policy will be made available on the Trust's intranet & website

8.2 This Policy will be issued to Essex Police and HM Prison Service.

## **9.0 References**

- The Medical Ethics Department of the British Medical Association guidance.
- NHS PROTECT guidance on Patients recording NHS staff in health and social care settings, dated May 2016
- NHS PROTECT 'Misuse of social media to harass, intimidate or threaten NHS staff'.
- Protection From Harassment Act 1997
- Public Order Act 1986
- Malicious Communications Act 1988
- Communications Act 2003.
- GDPR May 2018
- CQC Guidance - Thinking about using a hidden camera or other equipment to monitor someone's care'
- Department of Health, 'Using mobile phones in NHS hospitals', (2005,2009)