

YOUNG PEOPLE AND LEGAL CONSENT

SHEET 4: PHOTOS AND VIDEOS



This fact sheet provides information about issues surrounding young people's right and ability to provide consent under NSW law. It is part of a four sheet package written for youth services and other organisations and applies the legal principles outlined in *Sheet 1: Background to Consent*. Where a term is explored in more detail in *Sheet 1*, it is highlighted, so that workers and organisations can access this sheet at their discretion for the full definition.

NORMAL USE OF PHOTOGRAPHS AND VIDEO

Photography and video are so commonplace these days that it can be easy to think that there are no legal issues involved.

Generally, people are free to photograph or video other people with or without their consent or knowledge (there are a few exceptions, such as photography and video for improper sexual purposes).

When a photo or video is taken, the photographer (or their employer, if it is for their work) owns the copyright – the right to control use of the image. People who appear in a photo or video generally do not have legal rights over how that image is used. This means that a photo or video can be used in traditional media, online, in print, in a public display or a presentation without the knowledge of the subject.

Of course, this information only applies to images in which people might be recognised. Other than copyright, there are no legal restrictions on use of images of people who cannot be recognised.

YOUTH SERVICES USING PHOTOGRAPHS AND VIDEO OF CLIENTS

Privacy rights of clients

Service providers must comply with privacy laws. Privacy laws require that information about clients isn't disclosed without their consent. Information extends to the fact that the person is a client of your agency. Such a disclosure could occur through the publication or public use of an image of the person.

Privacy law gives additional protection to sensitive information, including a person's ethnicity, religion, criminal record, sexuality and health information. Health information includes such things as disabilities, mental health problems, and drug use and treatment. Service providers need to be especially careful when publishing images in connection to programs that relate to any of these sensitive issues.

Obtaining informed consent

Service providers should get **the informed consent** of the client before taking a photo or video which depicts them. Informed consent in this context means informing the client how the photo or video might be used or published, before they consent.

Read about informed consent and young people's increasing capacity to provide their own consent in *Sheet 1: Background to Consent*

Informed consent requires that all necessary information for the person's decision is provided, such as:

- Where and how the image will be used
- Whether the person's first name, last name, suburb, school/college or other potentially identifying information will be included with the image
- In what context the image will be used – eg. will it be connected with a particular program or activity?

Informed consent must be voluntary, so it may be legally questionable to make that consent a condition of taking part in an activity or program.

If prior consent was not obtained (e.g. where a photo was taken by someone else, or sent through by young people participating in an activity), the people in the image must provide consent before it can be used.

Similarly, where the use of the image is changing (e.g. the organisation wants to use a Facebook image in an annual report), the people in the image must consent to the new use of the image.

If your agency doesn't own the image, then you also need the consent of the copyright owner – most likely the person who took the photo or their employer.

It may be administratively convenient to ask for consent to use the image 'for any purpose, by any section of the agency, in any context, in any media', but legally such a consent may be too broad and vague to be valid. You should be specific about what uses you are seeking consent for (see the section below about recommendations for the policies and procedures of services).

People can consent verbally or in writing – there is no set format. However, if the situation is very sensitive, it may be safer to confirm their consent in writing, to avoid uncertainty in the future. The consent form needs to include all the information referred to above.

Duty of care for clients

Someone associated with a service may be put at risk if their location is identified by someone who wishes them harm, such as in a domestic violence situation. Publication of a photo or video depicting the person might help the perpetrator to locate them.

If a person tells a service that their safety is at risk if their name, location or contact details become known to someone else, then the organisation has a duty of care to avoid revealing those things. To fulfil this duty, this may mean avoiding all publication of images of the person.

Depending on the circumstances, this duty might extend to prohibiting other clients or their families from using or sharing photos and videos of the person. This might be difficult to achieve in practice, but services should take all reasonable steps to ensure that clients are safe.

SPECIFIC INSTANCES OF IMAGE PROTECTION

Inciting hatred and ridicule

NSW discrimination law prohibits the publication of material that incites or encourages hatred, serious contempt or severe ridicule of someone because of their homosexuality, their transgender status, or their race, nationality or ethnic group.

While services are unlikely to publish such material directly, they are responsible for administering social media to ensure that others don't publish such material (either as words or images) on their accounts.

Defamation

Legally services must ensure that the context in which images are used do not risk defaming – damaging the reputation of – a client or anyone else.

There is a risk of defamation if photos or videos are published which depict a recognisable person in the context of a sensitive activity (e.g. a service's drug program, mental health group, marriage counselling or post-release program).

Involvement in legal proceedings

NSW law protects people aged under 18 from having their identities published or broadcast in relation to:

- Criminal proceedings (where the under-18 is defendant, victim, witness, or otherwise involved)
- Child protection proceedings (including reports and Children's Court cases)
- Apprehended Violence Order (AVO) cases.

There are also laws which protect:

- The identity of anyone (child or adult) involved in Family Court proceedings in Australia
- The identity of the victim (child or adult) in court proceedings for most sexual offences in NSW.

Organisations should seek legal advice if they work with above groups. Each of these laws have specific details which make them complex to navigate.

In the absence of specific legal advice, it is safer to avoid publishing anything which might identify a person (e.g. image, name or other identifying details), in a context which says or implies that they have been involved in one of the types of cases above.

RECOMMENDATIONS FOR SERVICE POLICY AND PROCEDURE

Complying with the multiple laws in this area poses administrative challenges for service providers, especially those that run social, recreational and sporting activities, or large or regular events. These services take a lot of photos and videos, and generally upload some of these to one or more social media accounts. Workers might also upload some files to individual computers, agency file servers or cloud storage and web pages.

Services need very clear administrative procedures to ensure that images are not wrongly used. These procedures need to have several layers, including the following requirements:

1. Seek consent in advance for photography and video, and try to avoid taking images where consent has not been provided
2. Immediately delete all copies of images where informed consent has not been provided
3. Only allow onto agency devices and accounts those images taken by others (clients etc.) where prior informed consent has been provided, or which informed consent can easily be obtained
4. Set up an administrative system for recording consents, and only use or publish images that have an appropriate consent attached.

This series of fact sheets was a collaboration between Youth Action and Shopfront Youth Legal Centre, and were written by Nick Manning. All legal advice contained herein was accurate at the time of writing in January 2018.