



TASMANIAN MEDICAL PRACTITIONERS AND PRIVACY LAW



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Purpose

The purpose of this paper is to review privacy law that is relevant to medical practitioners in Tasmania. The federal *Privacy Act* is considered, and a table comparing the Tasmanian and federal Privacy provisions is also included.

This paper is for general guidance only. Particular matters should be the subject of specialist advice. Privacy law can be complicated.

Abbreviations

In this paper:

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| <i>FOI Act</i> | Means the freedom of information legislation for the State or Territory being discussed. |
| <i>IPPs/NPPs</i> | Mean the information privacy principles and the national privacy principles respectively in the <i>Privacy Act</i> . |
| <i>medical practitioner</i> | Includes general practitioners and specialist doctors practising in the private sector or the public sectors. References to a “medical practitioner” include, where appropriate, the health services organisation of which an individual practitioner may be a part. |
| <i>Privacy Act</i> | Means the <i>Privacy Act 1988</i> (Commonwealth) which applies in each of the States and Territories. |

Tasmania

1 Ownership of medical records

As a general rule, medical records are the property of the medical practitioner in Tasmania who created them.¹ The purpose of creating the records is likely to determine who owns the records. Medical records are ordinarily created by the medical practitioner for their own professional purposes in order to provide health care services to the patient, including diagnosis, treatment and advice.

As such, unless there is a specific provision in the contract between the medical practitioner and the patient to the effect that intellectual property in medical records will belong to the patient (normally, there isn't), any records including notes will remain the property and copyright of the medical practitioner. The medical practitioner does not compile records as agent for the patient.

Also, there is no distinction between proprietary rights to the physical records and proprietary rights to the information contained in the records. The information, once imparted to the patient, belongs equally to the medical practitioner and the patient.

2 Exceptions to the general rule

X-rays, photographs, pathology reports and the like obtained by a medical practitioner on behalf of the patient and paid for by the patient (or the patient's health fund) are likely to belong to the patient.

If a medical practitioner is not a treating doctor but prepares a medical report at the request of an insurance company (for example), the purpose of compiling the report might mean that the requesting party will own the report.

Once legal proceedings have commenced in any particular case, a right of access to medical records normally exists pursuant to compulsory court process.

3 Access to medical records

At common law, a patient had no right of access to his or her medical records, unless the contract between the medical practitioner and the patient provided the patient with such a right (normally, it doesn't).ⁱⁱ However, the common law is now overridden to a large extent by the two pieces of legislation referred to below.

Firstly, the *Privacy Act* provides for a right of access by a patient to his or her own medical records in the public and private health sectors. The *Privacy Act*, which has applied to all medical practitioners in the private health sector since 21 December 2001 regardless of the size of their business, is discussed below.

4 The FOI Act and medical records

Secondly, the Tasmanian FOI Actⁱⁱⁱ and the Commonwealth's FOI Act^{iv} may allow access by a person to their medical record held by a Tasmanian or Commonwealth public institution or government agency. The FOI Acts exempt personal information, such as medical records, and so a third party cannot seek access to someone else's medical records.

Also, there may be an exception for therapeutic privilege, where there is reasonable concern about possible adverse effects on the patient's physical or mental health as a result of granting access, although a legal or medical representative may be granted access.

5 The federal *Privacy Act*

The *Privacy Act* applies to the Tasmanian public and private health sectors. It regulates:

- The collection of health information;
- The use and disclosure of health information;
- Data quality and security of health information;
- Openness of health information;
- Access and correction of health information; and
- Identifiers and anonymity.

These matters are discussed under the sub-heading "The federal *Privacy Act*".

6 Tasmanian specific privacy legislation

Tasmania does not have specific privacy legislation for the private sector, however the *Personal Information Protection Act 2004* (Tas) regulates privacy issues for the public and local government sectors. For information to be protected under this Act it must not have been volunteered by the patient on an unsolicited basis^v.

This Tasmanian legislation parallels the federal *Privacy Act* except for small departures. In particular, the federal *Privacy Act* only applies to the personal information of living individuals whereas the Tasmanian legislation protects the personal information of the living as well as individuals who have been dead for up to 25 years.^{vi}

See the comparison table of the federal *Privacy Act* and Tasmanian *Personal Information Protection Act 2004*.

The federal *Privacy Act*

7 Application in all States and Territories

The *Privacy Act* extends to all individual and institutional health service providers in the private and public sectors, in all States and Territories.^{vii} The Act covers a wide range of information handling practices.

The Act only applies to “personal information”, being information about a living individual who can be identified, or whose identity could be reasonably ascertained, from the information. “Health information” as a subset of personal information is:

- about an individual’s health or disability, past present or future;
- about an individual’s expressed wishes regarding future health services;
- about health services provided, or to be provided to the individual;
- collected whilst providing a health service; or
- collected in connection with the donation of body parts or substances.

The *Privacy Act* is based on the IPPs/NPPs which apply to the public and private sectors respectively. The IPPs/NPPs represent the minimum privacy standards for handling health information. The IPPs/NPPs apply to health information in any form, including paper, electronic, visual (x-rays, CT scans, videos and photos) and audio records. Higher privacy standards apply to the handling of health information compared to mere personal information.

The *Privacy Act* only applies to decisions about how a person’s health information is collected, used or disclosed. The *Privacy Act* does not cover consent to medical treatment. Privacy of the body is a common law principle, which is overridden by legislation in most jurisdictions which authorises, after arrest, a medical examination of a kind reasonably necessary to obtain evidence.^{viii}

8 Collecting health information under the *Privacy Act*

Medical practitioners may only collect health information with consent, except in the circumstances specified in the Act including emergencies and as required by law. A patient’s

consent can be express or implied. A conventional consultation can normally be regarded as implied consent.^{ix} Consent is only valid if the patient has been adequately informed and has the capacity to understand, provide and communicate their consent.^x

There are a limited number of situations where the *Privacy Act* allows health information to be collected without consent, in particular, if:

- (a) the information is necessary to provide a health service to the patient; and
- (b) the information is collected:
 - (i) as required by law (for example, State and Territory legislation requires information about some notifiable diseases to be collected); or
 - (ii) in accordance with rules established by a competent medical body that deals with obligations of professional confidentiality binding on the medical practitioner; or
- (c) the collection is necessary for research relevant to public health and conditions specified in the *Privacy Act* are satisfied.

Health information can only be collected for the practitioner's functions. Medical practitioners must also take reasonable steps to ensure that patients are aware of how their health information will be handled, that they are able to gain access to the health information, and the purposes for which the information is collected. Consent about future uses of information can be obtained at the time the information is collected, or after it is collected.

9 Use and disclosure of health information under the *Privacy Act*

A medical practitioner must not use or disclose health information for a purpose (the secondary purpose) other than the primary purpose of collection unless:^{xi}

- (a) both of the following apply:
 - (i) the secondary purpose is directly related to the primary purpose of collection; and
 - (ii) the patient would reasonably expect the medical practitioner to use or disclose the information for the secondary purpose; or
- (b) the patient has consented to the use or disclosure; or
- (c) the use or disclosure of the health information is necessary for research, or the compilation or analysis of statistics, relevant to public health and safety, and other stipulations in the *Privacy Act* are satisfied; or
- (d) the medical practitioner reasonably believes that the use or disclosure is necessary to lessen or prevent:
 - (i) a serious and imminent threat to a patient's life, health or safety; or
 - (ii) a serious threat to public health or public safety; or
- (e) the use or disclosure is required or authorised by or under law.

The "required or authorised by law" exception is a wide exception. A subpoena to produce is a classic example.^{xii} Unlike legal professional privilege, there is no medical professional privilege at common law. There may be a statutory medical professional privilege in

evidence legislation of some States or Territories.

Also, in all States and Territories medical practitioners are required by legislation to report certain contagious and infectious diseases, including HIV/AIDS and sexually transmitted diseases. Child abuse is normally reportable. In exceptional circumstances, there may be a public interest exception to disclosing confidential health information.

Despite the prohibition against use or disclosure above, a medical practitioner may disclose health information to a person who is responsible for the patient if:

- (a) the patient:
 - (i) is physically or legally incapable of giving consent to the disclosure; or
 - (ii) physically cannot communicate consent to the disclosure; and
- (b) the medical practitioner (or the actual carer providing the health service) is satisfied that either:
 - (i) the disclosure is necessary to provide appropriate care or treatment of the patient; or
 - (ii) the disclosure is made for compassionate reasons; and
- (c) the disclosure is not contrary to any wish:
 - (i) expressed by the patient before the patient became unable to give or communicate consent; and
 - (ii) of which the carer is aware, or of which the carer could reasonably be expected to be aware; and
- (d) the disclosure is limited to the extent reasonably and necessary for a purpose mentioned in (b) above.

10 Data quality and security under the *Privacy Act*

A medical practitioner must take reasonable steps to make sure that the health information it collects, uses or discloses is accurate, complete and up-to-date.

A medical practitioner must also take reasonable steps to protect the health information from misuse, loss and unauthorised access, modification or disclosure.

11 Openness under the *Privacy Act*

A medical practitioner must set out in a document clearly expressed policies on its management of health information.

A medical practitioner must make the document available to anyone who asks for it and, generally to answer questions about the practitioner's privacy policy.

12 Access and correction under the *Privacy Act*

A medical practitioner must provide a patient with access to health information held by the practitioner on request except to the extent that:^{xiii}

- (a) providing access to the information would pose a serious threat to the life or health of any individual (an imminent threat to life or health is not necessary as with other

- personal information);
- (b) providing access would have an unreasonable impact on the privacy of other individuals;
 - (c) the request for access is frivolous or vexatious;
 - (d) providing access would be unlawful; or
 - (e) denying access is required or authorised by or under law.

There is also a limited exception in relation to commercially-sensitive information. Generally, a medical practitioner must provide reasons for denial or access.

In the case of most exceptions (not commercially-sensitive information), the medical practitioner must, if reasonable, consider whether the use of mutually agreed intermediaries would allow sufficient access.

A medical practitioner may charge for providing lawful access to health information, but charges must not be excessive. If a patient is able to establish that health information is not accurate, complete or up-to-date, the medical practitioner must take reasonable steps to correct the information, or provide reasons for not correcting the information.

The question of ownership of medical records and the issue of confidentiality concerning those records are two distinct matters. As discussed above, where a treating medical practitioner, through the exercise of intellectual skills, applies professional knowledge to health information chosen from the patient's history to document results of the consultation, the medical practitioner becomes the owner of the 'new' information.

A patient's right to access files containing health information depend on the circumstances of each case. In the context of the right of access under the *Privacy Act*, there might be a 'therapeutic privilege' whereby a medical practitioner can lawfully withhold information that may be detrimental to a patient.

13 Identifiers and anonymity under the *Privacy Act*

A medical practitioner must not adopt as his or her own identifier of a patient an identifier assigned by a government agency, for example, a Medicare number.

Wherever it is lawful and practical, patients must have the option of not identifying themselves when dealing with a medical practitioner.

14 Sanctions under the *Privacy Act*

The federal Privacy Commissioner can enforce the *Privacy Act* against medical practitioners by making a determination that may involve performing an act or payment of compensation or costs. Action can be taken in the Federal Court to enforce the Commissioner's determinations, although a breach of the *Privacy Act* is not a criminal offence.

This sanction is in addition to the usual sanctions at common law for damages, emotional distress or suffering. Medical practitioners in Australia owe their patients a legal and ethical duty not to use or disclose personal health information without their patient's consent unless a legal obligation or recognised exception exists.^{xiv} The relationship between medical practitioners and their patients is traditionally contractual in nature. Even when the contract is non-written (verbal), it will normally contain an implied condition imposing a duty to act at

all times in the best interests of the patient and a duty of confidentiality.

Comparison between Commonwealth and Tasmanian legislation

| | Commonwealth | Tasmania |
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| Legislation | <i>Privacy Act 1988</i> | <i>Personal Information Protection Act 2004</i> |
| Who does the legislation apply to? | All individual and institutional health service providers in the private and public sectors, in all States and Territories. | Public and local government sectors. |
| Which information is effected by the legislation? | <p>“Personal information”, being information about a living individual who can be identified, or whose identity could be reasonably ascertained, from the information.</p> <p>“Health information” is a subset of this.</p> | Substantially the same as the federal <i>Privacy Act</i> , except that the <i>Personal Information Protection Act 2004</i> also protects the personal information of individuals who have been dead for up to 25 years. ^{xv} |
| When may information be collected? | <p>Health information may only be collected for the practitioner’s functions and with the patient’s consent, which may be express or implied.</p> <p>There are also a number of situations where consent is not required, including:</p> <ul style="list-style-type: none"> • the information is necessary to provide a health service for the patient; • the information is of a type where its collection is required by law or by the rules of a competent medical body; and • the collection is necessary for research relevant to public health and conditions specified in the <i>Privacy Act</i> are satisfied. | Substantially the same as the federal <i>Privacy Act</i> . ^{xvi} |
| When may information be disclosed? | <p>Only if the purpose of the disclosure is related to the purpose for which the information was collected, and the patient may reasonably expect the information to be disclosed for that purpose.</p> <p>Other possible circumstances where information may be</p> | Substantially the same as the federal <i>Privacy Act</i> , although there are a number of additional situations in which information may be disclosed. ^{xvii} |

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| | <p>disclosed include:</p> <ul style="list-style-type: none"> • the patient has consented to the use or disclosure; • assuming threshold stipulations in the <i>Privacy Act</i> are satisfied, the use or disclosure is necessary for research relevant to public health and safety; • the medical practitioner reasonably believes that the use or disclosure is necessary to lessen or prevent: <ul style="list-style-type: none"> ○ a serious and imminent threat to a patient’s life, health or safety; or ○ a serious threat to public health or public safety; or • the use or disclosure is required or authorised by or under law. | |
| How must the collected information be treated? | <p>Reasonable steps must be taken to ensure that any health information collected, used or disclosed is accurate, complete and up-to-date.</p> <p>Reasonable steps must also be taken to protect the information from misuse, loss, unauthorised access, modification or disclosure.</p> | Substantially the same as the federal <i>Privacy Act</i> , with the additional condition that information must be kept relevant to the functions and activities of the holder of the information. ^{xviii} |
| What right of access does the patient have to the information? | <p>Patients must be provided with access to health information held by a medical practitioner on request except in certain circumstances including where:</p> <ul style="list-style-type: none"> • providing access to the information would pose a serious threat to the life or health of any individual; • providing access would have an unreasonable impact on the privacy of other individuals; • the request for access is frivolous or vexatious; • providing access would be unlawful; or • denying access is required or authorised by or under law. | Right of access is as set out in the <i>Freedom of Information Act 1991</i> (Tas), which gives a broad right of access to any documents of a government agency or Minister, with some exceptions. ^{xix} |
| What are the sanctions for breach of the legislation? | Breach of the <i>Privacy Act</i> is not a criminal offence, however the federal Privacy Commissioner can enforce the <i>Privacy Act</i> against a breach by making a determination that may involve the party breaching the act performing an act or payment of | Breaches of the <i>Personal Information Protection Act 2004</i> are referred to the Ombudsman for investigation, following which the Ombudsman advice and any recommendations will be given to the relevant government Minister to be tabled in both Houses of Parliament. |

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| | <p>compensation or costs.</p> <p>The usual sanctions at common law for damages, emotional distress or suffering and the like also apply.</p> | <p>The Ombudsman may also make recommendations and report the matter to any authority it considers appropriate.^{xx}</p> <p>The usual sanctions at common law for damages, emotional distress or suffering and the like also apply.</p> |
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Endnotes

TAS

- ⁱ *Breen v Williams* (1996) 186 CLR 71
- ⁱⁱ *Breen v Williams* (1996) 186 CLR 71
- ⁱⁱⁱ *Freedom of Information Act 1991* (Tas)
- ^{iv} *Freedom of Information Act 1982* (Cth)
- ^v Section 11, *Personal Information Protection Act 2004* (Tas)
- ^{vi} Section 3, *Personal Information Protection Act 2004* (Tas)

The federal *Privacy Act*

- ^{vii} Sections 6D(4) and 16A(2), *Privacy Act*.
- ^{viii} There is a fundamental right to inviolability, underscored by criminal and civil laws against assault. The legislation which authorises, after arrest, medical examination of a kind reasonably necessary to obtain evidence is the *Crimes (Forensic Procedures) Act 2000* (ACT), the *Police Powers and Responsibilities Act 2000* (Qld), the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the *Forensic Procedures Act 2000* (Tas), the *Summary Offences Act 1953* (SA), the *Criminal Investigations (Identifying People) Act 2002* (WA) and the *Police Administration Act 1978* (NT). There is no equivalent Victorian legislation.
- ^{ix} Collecting information about a patient's family members, for example when taking a medical history, might technically require consent from the family members unless a statutory exception exists.
- ^x Consent can be given by another person on behalf of the patient in special circumstances.
- ^{xi} Among other things specified in the *Privacy Act*.
- ^{xii} Although care should be taken that the validity of the subpoena is not successfully challenged by someone. The medical practitioner is entitled to challenge a subpoena.
- ^{xiii} Among other things specified in the *Privacy Act*.
- ^{xiv} The source of this obligation was the Hippocratic Oath written in approximately 400 BC, which has remained in Western civilisation as an expression of ideal conduct for a medical practitioner. The oath is no longer required because it is included in contemporary codes of ethics, for example, the *Australian Medical Association Code of Ethics 2004*: <http://www.ama.com.au/web.nsf/doc/WEEN-6VL8CP>

Appendix

- ^{xv} Section 3, *Personal Information Protection Act 2004* (Tas)
- ^{xvi} Schedule 1, Principle 1, *Personal Information Protection Act 2004* (Tas)
- ^{xvii} Schedule 1, Principle 2, *Personal Information Protection Act 2004* (Tas)
- ^{xviii} Schedule 1, Principles 3 and 4, *Personal Information Protection Act 2004* (Tas)
- ^{xix} Parts 2 and 3, *Personal Information Protection Act 2004* (Tas)
- ^{xx} Part 4, *Personal Information Protection Act 2004* (Tas)