

Health Insights

A case scenario on patient privacy – can I discuss a deceased patient’s care with their family members?

Meridian Lawyers often receives calls from doctors and other health practitioners requesting one-off advice relating to their day-to-day practice. Recently, we received a number of requests for advice about patient privacy and more specifically about the circumstances in which a health practitioner might be permitted to discuss a deceased patient with their family.

The question of whether patient confidentiality extends beyond death is naturally a sensitive one, and many health practitioners may feel they have a moral obligation to help grieving family members make sense of their loss by discussing the deceased patient with them. However, the law in Victoria is quite clear in this area, and practitioners should make themselves aware of their obligations when it comes to discussing deceased patients before any conversation takes place.

In this Health Insight we summarise the key legal obligations for health practitioners relating to deceased patient privacy, and when (if ever) information about a patient can be disclosed after death. We also explore a case scenario which demonstrates the operation of the legal principles in day-to-day practice.

What are the legal requirements for disclosing patient information after death?

In Victoria, the *Health Records Act 2001* (Vic) (the **Act**) creates the framework for protecting the privacy of individuals’ health information. It sets out the rights and obligations relating to the collection, use and disclosure of this information.

Section 95 of the Act addresses the circumstances involving an individual who has been deceased for 30 years or less, and states that the Act applies to such a person “...in the same way as it applies in relation to an individual who is not deceased.”¹ This means that all of the ordinary and well-known principles of patient privacy and confidentiality endure for a patient, even after their death.

However, the general protection for a deceased individual’s privacy is qualified by section 95(2) of the Act which provides that a legal representative of the deceased person may exercise any right or power that the individual would have held under the Act, so far as the circumstances reasonably permit. This includes the

¹ *Health Records Act 2001* (Vic) section 95(1).

patient's right to request access to their health information. The term "legal representative" has a specific definition under the Act in relation to a deceased individual, and means a person:

- a) *holding office as executor of the will of the deceased individual where probate of the will has been granted or resealed in Victoria or any other State or Territory; or*
- b) *holding office in Victoria or any other State or Territory as administrator of the estate of the deceased individual*

The legal representative ought not provide consent under the Act (for example, to the release of health information), if the legal representative "knows or believes that the consent does not accord with the wishes expressed, and not changed or withdrawn, by the individual in his or her lifetime"² – any purported consent provided in these circumstances will be void.

Case scenario

The current patient of a psychiatrist unexpectedly commits suicide, and the patient's family wish to discuss the patient and their recent treatment with the psychiatrist. Is this discussion (including the disclosure of the patient's treatment history) permissible?

Under the Act, the psychiatrist cannot discuss the patient's health information or treatment history with the family until one or more of the family members takes the role of the patient's legal representative at law. This means that the person must hold office as executor of the will of the deceased patient where probate of the will has been granted or resealed, or as administrator of the estate. Until such time as a family member becomes the patient's legal representative, the legal obligation on the psychiatrist to protect the confidentiality of the patient's health information endures.

Once a person holds legal status as the deceased patient's legal representative (according to the definition of "legal representative" under the Act), the rights that the deceased patient would have had to access their health records will then be conferred onto the legal representative.

This article was written by Principal Kellie Dell'Oro and Associate Anna Martin. Please contact us if you have any questions or require further information.

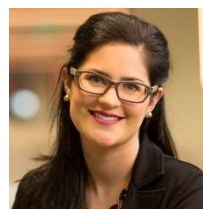


Kellie Dell'Oro

Principal

+61 3 9810 6775

kdelloro@meridianlawyers.com.au



Anna Martin

Associate

amartin@meridianlawyers.com.au

Disclaimer: This information is current as of December 2020. This article does not constitute legal advice and does not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of this article.

² *Health Records Act 2001* (Vic) section 95(3).