

**MEDICAL LAW  
SUMMARY  
2011**



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## 1. The Framework of Medical Law

### 1.1 Introduction to Medical Law

The law relating to health and medicine is an ever-changing field. The area of medical professional negligence litigation can be argued as one of the most difficult and technical forms of personal injury litigation.<sup>1</sup>

Under s 51(xxiiiA) the Commonwealth has power to make laws in relation to health and medical affairs. Each state also has such a power, as this conferred power is not exclusive. State and Territory legislation regarding health can be divided into three areas of 1) public health, 2) administration of public hospitals and licensing of private hospitals/nursing homes and 3) the regulation of health and medical professionals. Medical professionals include medical practitioners, nurses and allied health professionals.<sup>2</sup>

With the exorbitant increase in the number and cost of legal claims, and the subsequent impact on the medical indemnity and insurance industries, during 2001-2004 reforms took place by way of civil liability legislation being implemented in all Australian jurisdictions. This legislation, applying to claims alleging negligence, limits the way individuals can bring action for compensation for injuries sustained in civil actions, for instance, a shorter limitation period for initiating claims in the courts and the thresholds on the degree of injury were damages may be awarded for non-economic loss.<sup>3</sup>

Plaintiffs bringing a cause of action have a shorter period of time to initiate proceedings.<sup>4</sup> If the plaintiffs have less serious injuries or losses, they may be deterred from commencing proceedings,<sup>5</sup> given the limits on the potential compensation due to the thresholds and caps on damages in the civil liability legislation.<sup>6</sup> For instance, in the New South Wales Supreme Court and the Victorian County Court, specific professional negligence lists have been set up, where mediation is mandatory as a means of attempting to resolve disputes before hearings proceed. In most jurisdictions, health complaints bodies that are non-adversarial and involve confidential conciliation of disputes have been set up to provide affordable, accessible and reliable means for patients to make complaints about health services.<sup>7</sup>

It is becoming increasingly difficult for patients to sue their doctors due to the threshold requirements arising from the tort law reform. Doctors can obtain

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<sup>1</sup> Bates, PW (ed), *The Australian Health & Medical Law Reporter* (CCH Australia, looseleaf service, one volume, first issued 1988)

<sup>2</sup> Lexis Nexis, *Halsbury's Laws of Australia*, 280 Medicine, (1) Preliminary matters. 280-10: Regulation of Health Care by States and Territories. 2007.

<sup>3</sup> Loane Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences*, (3<sup>rd</sup> Ed, 2008).

<sup>4</sup> In Victoria, a plaintiff's claim must be brought within 3 years from the time their injury was discoverable or 12 years from the date of the act/omission causing injury or death (Limitation of Actions Act 1958 (Vic) s27D). Similar conditions apply to litigants in NSW (Limitation Act 1969 (NSW) s50C).

<sup>5</sup> Loane Skene, above n 2, 4.

<sup>6</sup> See Wrongs Act 1958 (Vic) s28G. Civil Liability Act 2002 (NSW) ss 14(2), 15, 17(2), 21. Civil Liability Act 2003 (Qld) s62. Civil Liability Act 2002 (WA) ss9(1), 10(1)(a). Civil Liability Act 2002 (Tas) s27. Civil Law (Wrongs) Act 2002 (ACT) s98. Personal Injuries (Liability and Damages) Act 2003 (NT) ss19, 27(1).

<sup>7</sup> Skene, above n2, 10-11.

insurance as a way of covering the costs associated with proceedings, insurance can also cover investigations by coroners, medical registration bodies, statutory health bodies, employment and credentialing inquiries, drugs and poisons authorities, criminal investigation bodies and more.<sup>8</sup> As an alternative, patients may seek other avenues of complaint including seeking compensation for their injury or to hold the doctor accountable. However, medical litigation judges have engaged in discussions highlighting the issue of the difficulty in obtaining expert evidence, not only due to its expense, but also where doctors are reluctant to testify against a colleague.<sup>9</sup>

## 1.2 The Legislation

The relevant legislation in relation to health and medical law is dependent on the jurisdiction to which the matter exists, and includes:

- The **Medical Practice Act 1994 (Vic)**, the **Health Professions Registration Act 2005 (Vic)**, the **Children, Youth and Families Act 2005 (Vic)**, the **Wrongs Act 1958 (Vic)**
- The **Civil Liability Act 2002 (NSW)**
- The **Civil Liability Act 2003 (Qld)**
- The **Civil Liability Act 1936 (SA)**
- The **Civil Liability Act 2002 (WA)**
- The **Civil Law (Wrongs) Act 2002 (ACT)**
- The **Civil Liability Act 2002 (Tas)**
- The **Personal Injuries (Liabilities and Damages) Act 2003 (NT)**

This is by no means an exhaustive list of all the legislation which is relevant to Medical Law in Australia. Also relevant are various medical and ethical codes, including but not limited to, the **National Statement on Ethical Conduct in Human Research 2007 Family Court Rules**, the **NHMRC's 2003 Guidelines** and their **2007 draft Guidelines on related ethical issues** and various other state **Law Reform Commission Reports**, particularly governing the issue of reproductive technology and privacy.

## 2. The Duties of Doctors

Health care professionals, including medical practitioners and nurses, are regulated according to accepted codes of ethics and conduct that are enforced within the state often established by their professional bodies.<sup>10</sup>

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<sup>8</sup> Medical Indemnity Industry Association of Australia (MIIAA), Medical Indemnity Forum, 24 August 2007, Canberra.

<sup>9</sup> Skene, above n 2, 15.

<sup>10</sup> Legal Online. The laws of Australia, 20 Health and Guardianship 20.2.1 Regulation of Health Care professionals. 1998. Natalie P Stoianoff.

These codes can be prescribed in specific legislation of the jurisdiction. The professional must be registered in accordance with the prescribed procedures in order to practice in their field. This is to ensure the professional has attained satisfactory qualifications, a standard of practice and is a fit and proper person for their field. Regulation also applies to practitioners whose conduct lies outside the scope of acceptable standards of practice.<sup>11</sup>

Australian law imposes a duty on medical practitioners to exercise reasonable care and skill when providing advice and treatment, and covers all ways they exercise their skills and judgement.<sup>12</sup> The duty exists for patient examination, diagnosis, treatment and providing information, irrespective of contractual obligations or gratuitously,<sup>13</sup> subject to legislative protections for volunteers<sup>14</sup> or good Samaritans.<sup>15</sup>

## 2.1 THE SOURCE OF DOCTORS' LEGAL DUTIES

There are many sources of legal duties imposed on doctors stemming from civil law, criminal law, disciplinary law, public law, equity and human rights and administrative law. As mentioned previously, the Commonwealth and each state and territory parliaments have the power to make laws in relation to health and medical matters and consequently there is both federal and state territory statutes, courts departments and hospitals. As a result, the law may be different in each jurisdiction. A means of having structural consistency is if the states confer legislative power on the Commonwealth.

Statutory duties imposed on doctors arise from the legislation governing the jurisdiction. In a general sense, statutory duties are clear and comprehensive. The applicable legislation, which impacts common law doctrines, in each state is listed below:

- **Civil Law Wrongs Act (ACT) 2002**
- **Civil Liability Act (NSW) 2002**
- **Civil Liability Act (Qld) 2003**
- **Civil Liability Act (SA) 2003**
- **Civil Liability Act (Tas) 2002**
- **Civil Liability Act (WA) 2002**
- **Personal Injuries (Liabilities and Damages) Act (NT) 2003**
- **Wrongs Act (Vic) 1958**

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<sup>11</sup> Legal online above n 10. (ibid).

<sup>12</sup> See *F v R* (1983) 33 SASR 189 at 190 per King CJ, *Rogers v Whitaker* (1992) 175 CLR 479 at 483, *Sidaway v Board of Governors of Bethlem Royal Hospital* [1985] AC 871 at 893.

<sup>13</sup> *R v Bateman* [1925] All ER Rep 45 at 48

<sup>14</sup> [Civil Law \(Wrongs\) Act 2002](#) (ACT) Pt 2.2, [Personal Injuries \(Liabilities and Damages\) Act 2003](#) (NT) s 7, [Civil Liability Act 2002](#) (NSW) Pt 9, [Civil Liability Act 2003](#) Pt 3 Div 2 (Qld), [Civil Liability Act 2002](#) (Tas) Pt 10, [Wrongs Act 1958](#) (Vic) Pt IX.

<sup>15</sup> See [Civil Law \(Wrongs\) Act 2002](#) (ACT) s 5, [Personal Injuries \(Liabilities and Damages\) Act 2003](#) (NT) s 8, [Civil Liability Act 2002](#) (NSW) Pt 8, [Civil Liability Act 1936](#) (SA) s 74, [Wrongs Act 1958](#) (Vic) Pt VIA, [Civil Liability Act 2002](#) (WA) Pt 1D.

The other duties owed by doctors stem from the common law. Generally speaking, doctors owe a general duty of care to a person who is in a sufficiently proximate relationship to the doctor.<sup>16</sup> Such a person may be owed this duty by the doctor even if they were not identified at the time of the breach.<sup>17</sup> Doctors also owe a duty to take reasonable care. When brought before the court, the judge(s) must decide whether, on consideration of all the evidence, the doctor's conduct is within the standard of care required – this is highly circumstantial.<sup>18</sup> There is often an overlap between statutory and common law duties. For example, breach of a statutory duty by a doctor can be evidenced by a failure to take reasonable care – a negligence action.



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<sup>16</sup> *X and Y (by her tutor X) v Pal* (1991) 23 NSWLR 26.

<sup>17</sup> *Chapman v Hearse* (1961) 106 CLR 112 at 120.

<sup>18</sup> Skene, above n 2, 26.