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Our Ref: AK:AS:23004

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05 May 2023

Director
Tasmanian Law Reform Institute
Private Bag 89
HOBART TAS 7001

Via email: law.reform@utas.edu.au

Dear Sir,

RE: REVIEW OF PRIVACY LAWS IN TASMANIA

Phillips Taglieri is a law firm that specialises in, among other areas, personal injury litigation.

Personal information such as medical records, medical imaging, accounting information, and employment information is often directly relevant to the quantification of damages in actions resulting from personal injuries.

Traditionally, a lawyer, acting as the express agent of their client, could write to a personal information custodian and request a copy of personal information relevant to a matter. Personal information custodians generally accepted the assertion of a lawyer-client relationship as a basis for agency or implied consent to release personal information without further controversy.

Since the advent of privacy legislation, in our experience, it has become increasingly difficult to obtain personal information relevant to a matter, notwithstanding that a client may expressly consent to the release of personal information.

This firm routinely asks clients to sign a 'medical access authority' or 'personal information access authority', which is provided to a personal information custodian along with a request for relevant personal information.

Despite the express consent of the client forming part of a request, personal information custodians, usually medical practices, routinely refuse to provide personal information under the guise of various excuses, usually relating to some misconstruction or misapplication of privacy principles.

When a personal information custodian refuses to provide access to personal information pursuant to Section 6 of Schedule 1 of the *Personal Information Protection Act 2004* (Tas), our usual procedure is to advise the custodian that the request will become a *Right to Information Act 2009* request for requested disclosure and that a failure to comply would be an offence under Section 50 of that Act. We accept the words "as if" in s 6(1)(b)(ii) create doubt as to whether s 50 applies to a "deemed" application of the latter Act to the former.

That said, usually the threat of potential criminal culpability results in the provision of the personal information. However, in our view, a person should never need to resort to such tactics to obtain vital information necessary to litigate a matter.

Insofar as it might be said that production of the information may be the subject of a Subpoena to Produce Documents or Things, this presumes that proceedings have commenced in a court or tribunal and that leave for the early return of that subpoena has been granted. Often maters are resolved without the need to commence proceedings in a court or tribunal and therefore a summons or subpoena may be unavailable. Further, it is often prudent to explore issues of quantum to determine whether proceedings ought to be instituted. Thus, it is not always practical to seek a subpoena.

The use of the word *may* in Sch 1 Section 6(1)(a) is concerning because it creates a discretion in the personal information custodian, now as an administrative decision maker under an enactment, about whether to exercise a discretion in favour of granting access.

We think that, fundamentally, a person should have unrestricted access to their personal information subject to s 3B of the Act, and hence, the word 'may' should be replaced with the word 'must' and paragraph (b) ought to be deleted.

At present, a mandatory disclosure requirement only exists by virtue of a deemed incorporation of the *Right to Information Act.* As noted above, it is unclear whether the offence in s 50 applies. While an offence is helpful in creating specific and general deterrence from a failure to comply, it does not lead to the actual access or production of the information. Therefore, in our view, the Act should be amended to permit an order to be made by a suitable court or tribunal requiring access or production.

The other issue concerning Section 6 of Schedule 1 is that the provision only requires a personal information custodian to provide 'access' to personal information and, in theory, it is not necessary for a personal information custodian to provide copies of documents comprising personal information. If copies are not provided, this may impact upon discovery as part of the litigation process.

There is also no fee prescribed under the Act for access to personal information and copies of that information. In our experience, fees range from, for example,

$50.00 to over $1,000.00. We have found that personal information custodians who seek to avoid their access obligations under the Act often quote excessive amounts to access and copy records.

In summary, while the intention of the Act and the notion of privacy in general is admirable, in our view, privacy has gone too far and is having an adverse effect on the transmission of vital information. Amendments to the Act ought to be contemplated to make it clear that a personal information custodian must disclose information when requested and we suggest this occur within regulated framework.

Thank you for the opportunity of making this submission.

Yours faithfully
PHILLIPS TAGLIERI

Per

ALEX KENDALL