

Legal Issues for Telehealth Services

20 August 2020

Presenters: Michael Gorton AM and Dr Melanie Tan



Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar.
- We have BD tech support live to assist with any technical issues.
- Use the chat function for any comments/technical issues.
- Use the Q&A function for specific questions related to the webinar content. Questions will be addressed at the end of the webinar.
- There will be a post-webinar survey link sent at the end of the webinar. We value attendee feedback. Presentation slides will also be sent to all attendees.
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback.
- This webinar is being recorded.

Disclaimer

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice.

Should you require specific advice on the topics or areas discussed please contact the presenters directly.

Is Telehealth appropriate?

- Nature of the consultation (appropriate serious? proximity to health service?).
- Nature of client – aged/impaired/disability/cultural factors/IT literacy.
- Nature of issues emerging.
- Is the client supported on site, if necessary.
- Consider and plan for risks.
- Prepare for disclosures/changes during a telehealth session.
- Your competence/comfort with IT.
- When to “call it” → health service visit/ambulance?

System Clarity & Failure

- Quality of sound and picture.
- Ability to detect body language and expression.
- Follow up after system break or failure.
- Plan back up arrangements (phone?).
- Limits on ability to observe/assess clinical indicators.



Preparation & Consent

- Confirm for telehealth (and explain purpose and limitations).
 - Consent, risks, limitations of assessment/diagnosis (send information sheet?).
- Confirm for treatment (informed consent).
- Provide information in advance? Formal policy/information sheet?
- Recording? Need consent?
- Location appropriate (family, overhearing, duress?).
- Are you secure? Working from home – overhearing.

Confirm Identity

- New client?
- Information for billing.



Privacy

- Secure systems to ensure privacy (Zoom?).
- Does the client have privacy in place?
- Balance between support/privacy/pressure in place.
- Recording? – Consent to participate.



Record Keeping

- All notes and records as usual.
- Extra observations (body language, comprehension, concerns).
- Be cognisant of limitations.
- Ensure access.



Limitations

- Be alert/aware:
 - honesty/frankness
 - visual cues
- Warning signs?
- Follow up:
 - writing
 - phone
 - further consultation
 - family/carers?
 - further referral?



Liability – Standard of Care

- Same legal obligations as face-to-face/normal duty of care.
- Additional obligations due to limitations/higher risks? Higher duty?
 - Be aware/alert/things missed.
- Clear advice on changes to be alert to – when to call again? Visit doctor? Call an ambulance?
- Clinical emergency (client details/location/emergency contact).
- Confirm insurance.

Professional conduct – AHPRA Telehealth Guidance 27 July 2020

- Also: Medical Practitioners – Medical Board of Australia, Guidelines for Technology-based consultations (16 January 2012).
- Seek advice from your insurer/medical indemnity provider – ensure telehealth is covered by your policy.
- Understand regulatory requirements – eg. health records, scripts, privacy, MBS.
- Same expectations re. professional conduct – Codes of Conduct apply.

HCCC v Goyer [2019] NSWCATOD 121

Amongst other things, the practitioner admitted:

“practising telemedicine and prescribing for patients without performing a physical examination is not best practice and in some instances is not good practice.”

And

“without the ability to conduct a full physical examination, “we” were “missing out on potentially important information on the patient’s current medical state. During telemedicine it can also be the case that a patient may not be as likely to share all their medical details with you as a practitioner – and looking at the medical records that were subsequently obtained, it is clear that some patients did not disclose full medical history.”

Regulatory changes



MBS - overview

1. *Health Insurance Act 1973*; Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020.
2. COVID-19 Temporary MBS Telehealth Services available since 13 March 2020 for out-of-hospital patients only.
3. Expanded - >279 telehealth item numbers. Must be safe and **clinically appropriate**. Video or audio?
4. Since 20 July 2020 – GPs and non-vocationally recognised doctors working in a general practice must have existing relationship with patient.
5. Applies to GPs, other medical practitioners, specialists and consultant physicians (including psychiatrists), nurse practitioners, participating midwives, allied health professionals and allied mental health providers.
6. Patient must be present.
7. Pathology and diagnostic requests.

MBS - billing

1. GPs and OMPs must bulk bill for certain categories.
2. Specialist and allied health services do not need to bulk bill – **informed financial consent.**
3. Consider if face to face consult necessary in addition.
4. Until 30 September 2020.
5. Full item descriptions on MBS online/MBS Changes Factsheet.

Prescriptions and telehealth

- COVID-19 National Health Plan: Interim arrangements for prescriptions for supply of medicines.
- Do not apply to Schedule 8 poisons or medicines in Appendix D of Poisons Standard.
- Will cease when temporary telehealth measures cease.
- 3 steps:
 - i. Paper prescription created during telehealth consultation (signed as normal/valid digital signature).
 - ii. Prescriber may create copy of signed prescription to pharmacy of choice or email/text copy (eg. photo or pdf).
 - iii. Prescribers email, text or fax digital copy directly to the pharmacy of the patient's choice. Prescriber must retain paper prescription for 2 years, pharmacist must retain copy for 2 years.

Electronic Prescribing (ePrescribing) - Overview

- Alternative to paper prescriptions – not replacement.
- Prescription Delivery Service must be enabled.
- Electronic and paper prescriptions must comply with legislative requirements.
- Two models:
 - i. Token Model (progressively available).
 - ii. Active Script List Model (from August 2020).



Regulatory Framework (PBS)

1. Essentially provided by changes to the National Health (Pharmaceutical Benefits) Regulations 2017 (made under the *National Health Act 1953*).
2. Requirements under the Regulations.
3. Four instruments under these Regulations:
 - i. Form of the Electronic Prescription 2019 – information fields required for electronic prescription.
 - ii. Electronic Prescription Information Technology Requirements 2019 – system requirements to participate in electronic prescribing.
 - iii. Form of the PBS Hospital Medication Chart – requirements for paper and electronic forms of medication charts for use in hospitals.
 - iv. Form of National Residential Medication Chart - requirements for paper and electronic forms of medication charts for use in RACFs.

Key messages

1. Understand what you can and cannot do.
2. Manage expectations – communication and informed consent.
3. Is it appropriate for **this particular** patient?
4. Keep good records.
5. Consider privacy.
6. Don't forget the full picture.
7. Keep the consult under review.
8. Keep up to date – seek advice if necessary.

Q&A – Your Russell Kennedy Contacts



Michael Gorton AM
Principal
(03) 9609 1625
mgorton@rk.com.au



Dr Melanie Tan
Senior Associate
(03) 9609 1577
mtan@rk.com.au



Feedback

Scan this QR code to provide instant feedback on the session.



Russell Kennedy Pty Ltd
info@rk.com.au
russellkennedy.com.au

Melbourne

Level 12, 469 La Trobe Street
Melbourne VIC 3000
PO Box 5146
Melbourne VIC 3001 DX 494 Melbourne
T +61 3 9609 1555 **F** +61 3 9609 1600

Sydney

Level 7, 75 Elizabeth Street
Sydney NSW 2000
Postal GPO Box 1520
Sydney NSW 2001
T +61 2 8987 0000 **F** +61 2 8987 0077

An international member of

Ally Law

Liability limited by a scheme approved under Professional Standards Legislation.

russellkennedy.com.au