

Regulatory and Legal Landscape for using Artificial Intelligence in Private Practice as a Member of the AACHP

By Vanessa Hamlin

Clinical note taking is a professional responsibility that acts as a protective mechanism for the practitioner and as a record of service that allows for facilitating a treatment plan, maintaining continuity of care and acts as a reflective tool for professional development and exploration during Supervision.

However as Artificial Intelligence (AI) encroaches on the way practitioners manage their business and client records, what are the salient points we all need to be aware of as we navigate this new technology? AI can be defined as ‘computer systems able to perform tasks that normally require human intelligence, such as visual perception, speech recognition, decision making and language translation’. For the purposes of this article, however, I will be focusing on speech recognition technology tools and AI scribes most often used by practitioners.

As an attendee at the Law for Mental Health Practitioners Webinar in May 2025 on behalf of the AACHP Committee, Legal Lead in AI Advisory, Chelsea Gordon, Senior Associate from Minter Ellison provided an overview of how AI is changing the healthcare industry and the risks and benefits that this would provide practitioners.

It became clear throughout the presentation that as privacy laws, regulatory frameworks and appropriate guardrails were discussed at length, the risks of using “*publicly accessible*” AI technology applications, referred to broadly as *AI Scribes*, rather than opting for marginally more secure “*closed system*” technology was alarming.

AI Scribes

Rapid advancements in AI, automatic speech recognition (ASR), and natural language processing (NLP) over the last five years have seen AI scribes evolve from relatively simple speech-to-text services into sophisticated tools to assist with the preparation of clinical notes, summaries, treatment plans, and referral letters if required.

AI scribes use a microphone to capture speech that is taking place during a consultation and then converts the audio data into text. Using the text transcription and instructions received by the user, the AI scribe leverages the connections between the words and concepts on which it was trained to construct documentation for use in a client’s record.

Of particular concern is that the audio data could be stored and ‘owned’ by the software vendor, with the potential that this data may not be able to be accessed by either the practitioner or the client at a later date.

Although this is still an emerging field, there are already a number of known issues with AI products that may affect the efficiency of AI scribes and there can be unforeseen legal problems that may also arise as their use increases. AI Scribing tools are usually intended for a general purpose and do not have a therapeutic use or meet the definition of a medical device and therefore are not regulated by the Therapeutic Goods Administration. (TGA)

In any consultation with a client, there will be relevant clinical information that is not explicitly discussed. Information from other sources, such as nonverbal cues from the client is also not captured in the aural record. Without integrating this information, the output generated by the AI scribe can be limited in its quality and efficacy.

In addition to this, AI scribes can make errors that affect the meaning and accuracy of clinical information, such as:

- Filtering out pertinent information, classifying it as irrelevant
- 'Mishearing' the speaker's accent or their use of slang terms, jargon or abbreviations
- Incorrectly categorising data, for example, confusing historical issues discussed in the consult by the client and their current presenting issues.

Risks and benefits of AI Scribes:

How it works:

AI scribes "listen" to a consultation and extract relevant information, which is then structured into a clinical note.

Output:

AI scribes can generate various documents like clinical notes, summary letters and referral letters.

Review and amendment:

The AI-generated notes need to be reviewed and amended by a practitioner to ensure accuracy and completeness.

Learning and personalization:

AI scribes can learn a practitioner's personal style and writing preferences over time.

Integration:

AI scribes can be integrated into practice software and electronic records systems or used as standalone tools.

Benefits:

AI scribes may help reduce the administrative burden on practitioners

Examples of AI scribes:

Lyrebird Health and mAlscribe are examples of AI scribe providers.

Cost:

AI scribes are much less expensive than human scribes.

Risks:

-Devices capable of being used to overhear, record, monitor or listen to conversations and ambient listening (including AI Scribes) where the recording party is not a part of the private conversation are strictly prohibited. Fines and penalties apply. For example, in Victoria, a breach carries a penalty under the Surveillance Devices Act of 1999 of two years imprisonment and a \$40,000 fine, unless informed consent has been obtained by all parties. Please note that 'informed consent' must include detailing both risks and benefits. (National surveillance legislation that is currently still in development is scheduled for ratification in parliament in 2026.)

- Recording conversations without consent (including on a mobile phone) is prohibited. Any visual recording of clients through surveillance devices at a place of business with or without audio must be disclosed via signage at the point of entry. This applies to closed system monitoring and surveillance that links to online devices. It is vital to consider privacy obligations, cultural sensitivities and indemnity insurance arrangements. Fines apply for non-compliance.

- “Hallucinations” is a term referring to all AI generated processes because of the incorrect information that is routinely presented as statement of fact. When used to assist with clinical notes or treatment plans the introduction of ‘third party’ information from AI generated platforms can leave the practitioner compromised and exposed to potential liability should their clinical notes be subpoenaed by the courts.

OAIC Guidance on Privacy and use of commercially available AI Products:

- The Office of the Australian Information Commissioner, (OAIC), can conduct investigations into potential breaches of privacy, including data breaches. It can also issue enforceable undertakings, seek civil penalties, and conduct assessments of privacy performance.

-Privacy obligations (refer to the 1988 National Privacy Act) apply to personal information input into and generated by an AI System

- Providers must update privacy documents to be clear and transparent about the use of all AI technology with clientele

-As a matter of best practice, do not enter personal information into publicly accessible generative AI tools such as Chat GPT, AI Scribes et al. Contracting and Procurement of AI technology must be fit for purpose, be routinely updated based on the latest research findings and stay within a “closed system”.

The 1988 National Privacy Act and the Office of The Australian Information Commissioner (OAIC)

The National 1988 Privacy Act is the principal piece of legislation protecting the handling of personal information about individuals and this includes the collection, use, storage and disclosure of personal information. In addition to this Act there is additional State and Territory Legislation and under current development is a Children’s Online Privacy Code to be released in 2026.

Considering the rapid advancement of technology, the Office of the Australian Information Commissioner (OAIC) enforces data breach notifications under the Act which can include seeking civil penalties for serious interferences with privacy. The OAIC is more likely to take strong enforcement action when a breach is particularly serious, egregious, repeated or has caused significant harm.

*Practitioners that use AI technology for personal, sensitive and health information must inform their clientele that this is how their private information is being stored and obtain consent before proceeding. Importantly, if you are updating from paper records and files or **archiving** to an online system of client data storage that uses AI technology, consent **must** be obtained from each current and/or historical client before doing so.*

What are the key considerations that practitioners should be aware of if currently using AI technology for record keeping and data storage?

Where is the data?

- Where is the data stored?-In the Cloud, in Australia or Overseas?
- Is the data encrypted in transit and at rest?
- Who can access the AI tool and the output that is generated ?
- Does the tool delete session data after use or does it store it long term?

What are the technology developers/vendors doing with this data?

- Is the vendor using client data to improve their model or selling information or their product to a third party?
- Are they using session data to develop other products?
- Will the vendor sign terms and provide assurances and warranties if you cannot access your data or if it is breached?
- Who actually owns the data? The practitioner or the vendor of the technology? (Predominately it is the vendor.)
- It is worth considering before procurement if the contract term with the vendor is sufficiently limited, so you can adapt to changing technology if more appropriate technology becomes commercially available.

What could go wrong?

- Are there safeguards against hacking, leaks or misuse? Can the vendor provide written details as to how they safeguard against this?
- What happens if the AI tool goes down?
- Have you conducted a Privacy Impact Assessment on your practice before rollout? Have you informed clients? Before uploading current or archival client data, individual informed consent must be obtained from each client.
- Is the vendor asking for indemnity from any loss, liability, demand, claim or action from you when using their product?
- Is there a warranty and is this a 'closed system' that is not publicly accessible? What governance mechanisms are in place to manage a changing technological landscape?
- Am I still protected by Australian Laws and Regulations if my AI product is offshore?
- Have you checked with your insurance provider to establish if you are covered under the terms of your policy to use AI tools in your practice? It is recommended that you seek professional advice to ensure that you hold appropriate indemnity insurance.

What information should my software vendor provide for me when I purchase their product ?

In negotiating with a software vendor offering an AI scribe, it is worth considering what assurances, if any, the provider gives about how the data is encrypted, stored, and destroyed. To help

prevent data breaches, it may also be of benefit to enable multifactor authentication on AI scribes and other applications for additional protection.

Software vendors may use collected data for secondary purposes such as for training AI models in order to improve the output of the digital scribe or to develop other AI products and they might also on-sell data to a third party. Therefore, it is vital to carefully review the terms and conditions of the user agreement to determine whether collected data will be used for secondary purposes by the vendor or a third party.

If data is processed or stored for any amount of time overseas, vendors must ensure that the country where it is stored has similar privacy standards and protections as that of Australia and should provide assurances to potential users that their product meets their Australian legal obligations in this regard. If the vendor cannot provide such assurances, then practitioners should consider whether what the vendor is offering is appropriate for the standards and practices of AACHP compliance and is within the parameters of the Office of the Australian Information Commissioner. (OAIC)

Sizable fines and imprisonment are just some of the actionable measures available to the OAIC, which is an independent Australian government agency that promotes and enforces privacy and freedom of information rights, in the event of a significant breach.

Transparency and Accountability

Practitioners are ultimately responsible for errors within their clients' records, even if they are generated by the AI scribe. It remains the responsibility of all practitioners that the output prepared by the AI scribe constitutes an accurate record of a consultation. If you decide to use this technology in your practice, you must correct any errors and address omissions before signing off on the documentation and entering it into the clients' record.

As AI tools gain popularity and their use increases, there is the potential to become over-reliant on their use and pay less attention to critical details or forgo the vital process of checking the output generated by the AI scribe, resulting in significant errors. In the event of a data breach, audio recordings, text transcripts, or documentation prepared by the AI scribe can also be intercepted or otherwise compromised.

It is also worthy to consider that the process of writing documentation not generated through AI technology can also in itself be a clarifying exercise and an opportunity to reflect on treatment approaches or strategies. The effects of removing this essential process are as yet unknown.

AI and Supervision

It is important to note that during any Group Supervision Session, or one to one Supervision Session, that the discussion of a client/s case must not contain any personal *identifiers*. If Supervision Session notes are compiled using AI technology and submitted to your Supervisor, they must not contain any identification of the client/s being discussed and must constitute an accurate record. Practitioners are ultimately responsible for errors within their Supervision Session Notes, even if they are generated by the AI scribe.

Supervision notes can be subpoenaed from Supervisors if there is an understanding that they hold relevant information relating to any actionable legal process.

Findings

Providing comprehensive written and verbal information to your clientele regarding the use of AI technology that is used in *any aspect* of your business and obtaining verbal and written informed consent from your clients, is just the starting point for transparency and disclosure.

Beyond this is the importance of also having a comprehensive understanding of the strengths and limitations of your AI product. Whilst procuring “closed system” AI technology, meaning that the data input is not being ‘fed back out’ as output to a third party, to support your business practice *may* potentially be the most viable option at this current time, developers and consumers of technology are all still navigating a very new and potentially litigious digital landscape.

The AACHP Committee recommends proceeding with caution and requests that members apply their own judgement in deciding whether to use an AI scribe, or indeed any AI tool, in their practice. Given its potential shortcomings and pitfalls, the AACHP Committee does not recommend or endorse any ‘publicly accessible’ or ‘closed system’ commercial AI products for use by its members.

Summation

In conclusion, it would serve any practitioner well to consider how they would feel about AI recording and storing private and sensitive personal information about them. If the thought makes you feel uncomfortable or hesitant, then we equally need to consider how choosing to utilise AI technology with clients could also emotionally impact them and the therapeutic alliance.

Although AI is an evolving tool, it is still simply just providing the ‘next best guess’ based on large language models (LLM). The practitioner always remains accountable for the AI output, must always have oversight over it and ensure that they have the correct amount and coverage of professional indemnity insurance before proceeding. *Tread very, very carefully.*

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