

7 Confidentiality, privacy and disclosure

Fundamental to a proper doctor–patient relationship is the assurance that information provided by the patient to the treating doctor will remain strictly confidential. Doctors must be free to ask their patients any questions necessary for diagnosis and treatment, and patients must be willing to trust doctors by giving full answers. Maintaining such trust has a wider social benefit of ensuring that medical practice serves to promote and maintain the health of the community. The basis of this trust lies in one of the oldest ethical principles of medical practice, stated in the Hippocratic Oath as:

Whatsoever I shall see or hear in the course of my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets [1].

This same obligation has since been repeated in the World Medical Association *Declaration of Geneva* as ‘I will respect the secrets confided in me, even after the patient has died’ [2].

This ethical requirement for confidentiality, well understood by doctors, has been overlaid in Australia in recent years by the progressive introduction of privacy legislation at the federal level and in some states, which for doctors covers very much the same territory.¹ As a result, doctors now need to understand the ethical and legal bases of their professional obligations in this regard. In this chapter, both bases are described and explained. In our view, doctors who fully understand, and conscientiously adhere to, the ethical principles involved in maintaining patient confidentiality, and who communicate effectively with their patients, are very unlikely to infringe their patients’ privacy. Australia’s complex privacy law includes not only different legislation at federal and state levels, but also between the public and private sectors. However, the key principles are common to all legislation. In some states, privacy law is contained within legislation that covers medical record keeping. Thus, this chapter needs to be read with Chapter 8 in mind.

7.1 Confidentiality distinguished from privacy

¹ The Australian Law Reform Commission conducted a detailed review of Australia’s privacy laws, including health privacy and in August 2008 issued its final report entitled *For your information. Australian privacy law and practice*, available at <http://www.alrc.gov.au>.

While at times the words *privacy* and *confidentiality* are used interchangeably, they are not the same thing, especially when considering privacy in its legal context. One big difference is that privacy law covers not only the issue of disclosure, but also issues of patients' access to their records, security of those records and maintenance of accurate and up-to-date records. The extension of federal privacy law to private medical practice in 2001 initially caused some concern because of its impact on everyday medical practice; for example, taking a family history. This example serves to demonstrate important differences between confidentiality and privacy.

Taking family medical history has long been routine in medical practice and the information collected has been protected by professional duties of confidentiality. Privacy law gave to family members a right to be informed when information personal to them was collected by a doctor from another family member, or to consent to that collection if it was health information. A determination of the Australian Information Commissioner (formerly known as the Federal Privacy Commissioner²) authorised such history taking [3] by releasing the doctor of the necessity of notifying family members about or seeking their consent to the collection of their health information. This authorisation was needed because family history information is personal information in that it identifies a relative. This highlights a key difference between confidentiality and privacy—privacy relates only to identifiable information, called personal information in the legislation, whereas confidentiality relates to all information provided by patient to her doctor. Another way of explaining the difference is that confidentiality protects the provider of the information but privacy protects the subject of the information.

More general concerns have been allayed with experience and the passage of time. Now it could be said that adjusting to the new laws has served the medical profession and the community well, as doctors have become more alert to having appropriate policies and processes in place to protect patient privacy and maintain patient confidentiality.

² In 2010, following new legislation known as the *Australian Information Commissioner Act 2010*, the Office of the Privacy Commissioner was incorporated into a new entity known as the Office of Australian Information Commissioner, with a new website, <http://www.oaic.gov.au>.