Confidentiality

\*\*Some of the HIV cases from negligence notes may also be relevant here

* Harvey v PD
* BT v Oei

1. INTRODUCTION

## Confidentiality arises from the nature of the relationship between the patient and the professional

* + 1. Confidentiality focuses on the disclosure of personal information to third parties
    2. NOT the collection of information

## Privacy arises from the personal nature of the information

* + 1. There is an overlap – can be confidential and private at the same time

Confidentiality is defined as the imparting/exchange of information in circumstances that when it was made the receiver and/or the person who made it was under an express or implied obligation not to disclose its contents irrespective of any obligation arising under law. *[Butterworth’s legal dictionary]*

* 1. Such disclosures made to health care professions where it is believed the information is to remain confidential therefore imposes an obligation on that professions to respect that confidence.
  2. **Privacy:** Relates to the collection of information
  3. **Confidentiality:** Relates to the disclosure of information to third parties and is more important in a medical context

1. HISTORY
   1. Began as an ethical requirement for health professionals governing their relationships with their patients
      1. Hippocratic oath
      2. Code of ethics
   2. Evolved in a model of health care that involved a patient interacting with one health professional
   3. More difficult and complicated when applied in modern health systems
2. **WHY CONFIDENTIALITY IS ESSENTIAL IN A HEALTH CARE SYSTEM**
   1. **Personal** – we feel uncomfortable that personal and sensitive information about our health may be disclosed to others without our knowledge and consent
   2. **Medical** – encourages patients to talk openly about private and sensitive matters relevant to diagnosis and treatment
   3. **Ethical –** respects the autonomy of an individual
   4. **Public policy** - promotes attendance for treatment and containment of illness, in its absence people may not present for treatment which could have a negative effect on the community’s health
3. Here [doctor] has disclosed \_\_\_\_\_\_\_ to a third party, to the detriment of [patient]. Subsequently, [patient] may have an action for breach of confidence.
4. WAS THE INFORMATION OF A CONFIDENTIAL NATURE?
   1. Personal information given in the course of the health care relationship which, if disclosed, is capable of identifying the patient
   2. Name, nature of illness, diagnosis, treatment
   3. Disclosure of information after it is anonymised does not breach an obligation of confidence
      1. ***R v Department of Health ex p Source Informatics*** 
         1. *Court of App had to decide whether disclosure of patient information which had been anonymised breached the obligation of confidence*
         2. *Coy had collected information from various parties and was used to form a data base for the use of pharmaceutical coys*
         3. *HELD: No breach here – considered ‘conscience’ of the discloser*
   4. Prescriptions given to a third party that does NOT contain identifying information of the patient does not breach a duty of confidence - a patient does not have any proprietary claim to the prescription form or the information it contains. (*R v Department of Health Ex Parte Source Informatics)*

“[T]he doctor is under a duty not to [voluntarily] disclose, without the consent of the patient, information which he the doctor, has gained in his professional capacity” *Hunter v Mann* [1974] QB 767

1. CIVIL ACTIONS
   1. The type of legal action that can be taken here will depend on what outcome is desired by [patient].
   2. Statutory Relief
      1. There are several state and federal statutes which further impose obligations of confidentiality.
         1. Federal Legislation
            1. Privacy Act 1988 (Cth)

These provisions are limited to medical professionals working in the private sector and do not apply to those working in State public hospitals

s14 IPP 11

Schedule 3 NPP 2.1

Organisations and individuals must not disclose or use personal information for a secondary purpose unless

The person concerned consents

Disclosure is required by law

Disclosure is necessary to prevent danger to an individual or public

* + - * 1. Complaint to Privacy Commissioner

Preferred remedy

Free – don’t need a lawyer

Can get damages even if suffered no damage

Enforceable if PC determines there has been a breach in Federal Magistrates Court

* + - 1. State legislation – The hardest thing to do is find the act that applies
         1. Queensland: privacy inquiries may be directed to the Department of Justice and Attorney-General
         2. New Act – Information Privacy Act 2009

Developed to deal with the collection and handling of information in the QLD public sector

Information can not be collected unless that is necessary for the purpose for which it is collected

The person must be aware before hand of the purpose for which the information is being collected

Information collected must be relevant and up to date

National privacy principles – Qld Health

**31 Health department to comply with NPPs**

(1) The health department must comply with the NPPs.

(2) Without limiting subsection (1), the health department—

(a) must not do an act, or engage in a practice, that

contravenes, or is otherwise inconsistent with a

requirement of, an NPP; and

(b) must not fail to do an act, or fail to engage in a practice,

if the failure contravenes, or is otherwise inconsistent

with a requirement of, an NPP.

(3) An act or practice mentioned in subsection (2) includes any

act or practice relating to the health department’s collection,

storage, handling, accessing, amendment, management,

transfer, use or disclosure of personal information.

**32 Noncompliance with particular NPPs**

(1) The health department is not required to comply with a

prescribed NPP in relation to an individual’s personal

information if the information is related to or connected with

personal information of the individual that has previously

been published, or given for the purpose of publication, by the individual.

* + - * 1. Public Health Act 2005 (Qld), ch 3

Both imposition of confidentiality and lawful disclosures

* + - * 1. Health Services Act 1991 (Qld), pt 7

Public sector health services only

* 1. Ethical Requirements and subsequent remedies
     1. In addition to the legal requirements for confidentiality, there are also ethical requirements placed on medical practitioners by industry code of ethics. Any breach of those ethical rules (e.g. AMA’s code of ethics) may lead to disciplinary action for professional misconduct in several areas (*Duncan v Medical Practitioners*).
     2. Complaint to registration board
        1. Health professional can be removed from register: *Duncan*
     3. Complaint to professional organisation
     4. AMA, is a self regulatory body, will be a declaration and ‘black mark’ on reputation but no real sanction
     5. Complaint to Health Complaints Office
        1. Conciliation, interaction with registration board
  2. Common law actions for breach of confidentiality duty
     1. Only needed where the matter falls outsider the jurisdiction of the Federal Privacy Act; where
     2. The doctor works in an unincorporated private practice
     3. The patient chooses to litigate in order to publicise or recover more substantial compensation
     4. In addition to the statutory and ethical requirements for confidentiality, doctors are also charged with a common law duty of confidentiality. Where this duty is wrongfully breached by a doctor and the patient has suffered an injury or loss may sue for compensation at common law.
  3. Tort
     1. As [patient] can establish they have suffered loss or damage (i.e. physical harm, financial loss, nervous shock, etc) as a result of the disclosure, [doctor] may be liable for damages as a result of a breach of duty (*Furniss v Flitchett*).
     2. The [patient] must be able to establish that:
        1. The health professional owed a duty of care to [patient] to avoid foreseeable harm (established category)
        2. He/she disclosed confidential information in breach of that duty
        3. The patient suffered damage that was caused by the disclosure of confidential information: *Furniss v Fitchett* [1958]
           1. Can be difficult to establish – usually only suffer humiliation – must suffer actual damage
        4. The loss/damage suffered was a reasonably foreseeable consequence of the doctors conduct
           1. It is often very hard to prove foresee ability as establishing a duty to avoid such disclosure is difficult to make out

***Furnis v Flitchett***

* *Couple having marriage problems*
* *Husband asked their Dr to give him information regarding his wife’s psychiatric problems*
* *This was later produced in court*
* *She suffered shock when finding out the opinion of her Dr.*
* *Owed her a duty to ensure that his expressions as to her mental condition did not come to her knowledge*
* *The issue here seemed to be that it came to HER knowledge* 
  1. Contract

There must actually be a contract between the patient and the health professional (Parry Jones v Law Society)

>>> Has the patient visited a GP? (NB: doctor must have been paid for services)

* + 1. As [doctor] is a GP, the [patient] may be able to argue a contract exists as between [patient] and [doctor]. In order to sue on the contract, [patient] must be able to show a breach of a term in the contract (express or implied) that the information was not to have been used without consent (*Parry-Jones v Law Society*) or that the provider will exercise reasonable care in the management of the information (*Furniss v Flitchett*). [patient] must also be able to establish they have suffered a loss as a direct result of that breach.
    2. in Furniss, made a statement to husband, gave it to solicitor, used it in divorce proceedings against wife

>>> Has the patient visited a hospital?

* + 1. Public hospital: No contract
    2. Private hospital: Contract exists
  1. Equity
     1. Alternatively, [patient] the court may choose to intervene where the doctor has unlawfully disclosed the information of a patient. [patient] may raise such an equitable argument independently from a duty of care or contractual basis, based on the courts ability to recognise the fairness and good faith that supports the policy of protecting confidential information of patients (*Seager v Copydex Credit*).
     2. Claimant must demonstrate: (*Coco v AN Clarke*)
        1. Confidential nature of the information
        2. Obligation of confidence
        3. Unauthorised use of the information

1. REMEDIES
   1. Injunction
      1. As [patient] desires to stop the continued publication of their confidential information, they may be able to seek an injunction in equity (*Breen v Williams*).
   2. Account of profits
   3. Damages
   4. Delivery up of documents containing confidential information
2. **MAKING A COMPLAINT** 
   1. A person who believes that one of the NPP’s has been breached may complain to the Federal Privacy Commissioner and the Commissioners determination may be enforced by the Federal court or the Federal Magistrates Court
      1. Patients can lodge the claim themselves
      2. The means of complaining is free under the legislation – do not have to resort to court
      3. Compensation may be awarded for hurt feelings or humiliation
         1. Do not have to show injury or loss was caused by the breach
   2. A person can also make complaints to a regulatory body such as the Queensland medical practitioners board for professional misconduct
3. EXCEPTIONS – WHERE CONFIDENTIALITY CAN BE BREACHED
   1. However, [doctor] will not be guilty of breaching any legal or ethical requirement of confidentiality if the disclosure falls into one of several circumstances where such disclosure is permitted by law.
   2. Consent of the patient
      1. As [patient] has consented to the disclosure they cannot then protest.
      2. Consent may be express or implied in the circumstances
         1. Express e.g. by signing contract containing clause allowing health professional to share information with other health professionals
         2. Implied (i.e. prescription to chemist, referral to a specialist, reports, common records, other health professionals)
            1. ***Harvey****:* (obiter) couple went to see doctor together for STD check, was implied consent that mutual purpose to check they had no STD’s so they could have unprotected sex with each other, mutual interest in results. One was positive, information not shared, was implied consent that it should have been shared
   3. Legal proceedings
      1. All information relevant in defending yourself you can disclose
      2. S62L, s62L(a)
   4. Statutory obligations for disclosure
      1. Here the information is of such a nature that \_\_\_(doctor)\_\_\_ is required by law to disclose the information and will therefore be protected from an action for breach of confidence.
         1. *Health Services Act 1991* (Qld) pt 7
         2. *Public Health Act 2005* (Qld)
      2. **Giving information to relatives:** Such as when someone is unexpectedly admitted to hospital
      3. Giving information **to other health care professionals** 
         1. Information may be used and exchanged for the necessary health care of the patient
         2. Can be used for the funding and management of health services but the patient must be anonymised first
            1. In these circumstances consent to the use of such information can be either express or implied
      4. **Birth, Deaths and Marriages:** health professionals must notify register of any at which they are present, if they examine a body, or any treatment provided immediately before death
      5. **Impaired drivers:** in some jurisdictions require health professionals to report where patients are impaired i.e. epilepsy, diabetes etc.
      6. **Drunk drivers:** Other jurisdictions provide protection for health professionals to report any impaired drivers
      7. **Infectious diseases:** health care to report e.g. tuberculosis, AIDS, polio, STD’s, cholera, leprosy, hepatitis,
         1. The public health act 2005 requires that a doctor or person in charge of a hospital of pathology lab has a duty to notify the chief executive s70-72
         2. It is an offence to infect others under s317 CC
         3. Pursuant to **s 62I PSA** the [doctor] can lawfully disclose the information to protect any victims of [patient’s] potential acts.
         4. Similarly **s 176 of MPRA 2001** provides that if a doctor, while acting in professional capacity honestly and reasonable believes an indictable offence has taken place and notifies the police than the doctor is not liable civilly, criminally or under an administrative process.
      8. **Impaired health professionals:** doctors must report if a registered health professional has an impaired condition that affects their ability to operate
      9. **Child abuse:** mandatory reporting, must have reasonable belief, to a specified authority only
      10. **Court order:** where the information is required as part of evidence in a court hearing, the practitioner will not be liable for disclosing that information and cannot refuse on the grounds such information is ‘legally protected’. (*Staib v Sarra*)
          1. Note that a failure to disclose may result in a contempt of court leading to a prison sentence
   5. Past criminal activity
      1. Some states (QLD) offer protection to doctors who report past criminal activity of patients
      2. NSW requires reporting
      3. Other states provide protection at common law for reports of serious nature
         1. Brown v Brooks: court refused to grant injunction to prevent nurse revealing information gained during counselling session – revealed sexual relations with step-daughter, he was up on sex charges
   6. Future criminal activity?
      1. *Edgell:* 
         1. *involved patient who had been incarcerated for offences against others, in a forensic medical hospital, moved him to a less secure facility, had sought independent evaluation of his condition from another psychiatrist*
         2. *However the independent identified serious conditions, sent report to patients solicitor, but they buried the report and approved the application*
         3. *Psychiatrist then released report on his own steam to the certain authorities*
         4. *HELD: was not a breach as it was only released to the appropriate auhtorities*
   7. Interests of the patient
      1. E.g. suicide risk to mental health authorities
      2. S62E Health services act allows disclosure to another health care professional if required for health of patient
      3. Limited to disclosure of the information needed to protect the interests of the patient
      4. *See W v Edgell*
         1. *If the Dr’s opinion is that disclosure to a third party other than a relative would be in the best interests of the patient it is their duty to make every reasonable effort to persuade the patient to allow the information to be given – even if the patient still refuses then it would only be in exceptional circumstances that the Dr. should withhold.*
   8. Public interest
      1. Although the law recognises a public interest in protection patient confidences, the law has in some instances recognised cases where disclosure to protect the general public has been lawful (*W v Edgell*). Here the court will seek to balance competing public interests and it is a matter of professional judgment (*Duncan*).
      2. Also see *Royal Womens Hospital*

***Royal Women’s Hospital***

* *Vic court of appeal ruled that the hospital had to give records for an investigation*
* *Hospital could not rely on public interest immunity*
* *Stated that the particular defence of PI should be reserved for government protection of the highest levels and in truly sensitive areas of information*

***Duncan v Medical Practitioners Disciplinary Committee***

* *Dr. told bus passengers that a bus driver who had a triple coronary by-pass was not fit to drive despite him being certified with that condition*
* ***HELD:*** *This was a wrongful disclosure of information*
* *PI is only confined to cases where the disclosure is made to a responsible authority*
* *His name was struck from the register as he was found guilty of professional misconduct*

***W v Edgell***

* *Patient was a prisoner in a secure hospital following convictions for killings*
* *He wanted to be transferred to a normal unit and the question was whether he was still a risk to the public*
* *Defence asked a psychologist to form an opinion and he found Edgell was still a risk*
* *It was up for review sometime later and realising that his report would not be considered the psych sent a copy to the medical director of the hospital*
* *The patient bought an action alleging breach of confidentiality*
* *HELD: in favour of the psych – that if a Dr. feels that a decision is about to be made based on inaccurate information then disclosure is ok*

1. **URGENCY/IMMEDIATE DANGER**
   1. Where a medical practitioner reasonably believes there is risk of immediate danger to other patients or health care professionals from a patient and that action is urgently required, that medical practitioner is able to take such action even where confidentiality is breached.
      1. Where patient leaves room with intent to kill/rape
      2. If partly immobile, are they risk to nurses etc
      3. Where patient with disease (e.g. AIDS) discloses to doctor they will act in such a way to infect others
   2. Disclosure to appropriate person/authority [*Duncan* & *Egdell*] s62K
      1. Must be in good faith
      2. Appropriate authority: someone who can do something about it, a disclosure made to an official that is relevant to function performed by that official
      3. *Duncan*
         1. Patient with serious heart condition
         2. Had outburst to whole world
         3. If he had limited his outburst, would have been fine
         4. But did not, disclosed to other patients and then whole nation through the media
         5. Was found guilty of professional misconduct to another patient, then guilty of disgraceful misconduct for revealing to the nation through the media
2. **DEFENCES A DR. MAY HAVE**
   1. That the patient consented to the disclosure either expressly or by implication
   2. The information was given in connection with the patients continuing health care
   3. The disclosure was required or permitted by statute or by a court order
3. **DUTY TO WARN**
   1. This must be distinguished from a justification for breaching a duty of confidence
   2. In some American cases it has been held that a doctor has a duty to warn a third party if a patient presents an imminent risks to that person (who is readily identifiable)
      1. *Tarasoff v Regents of UC*
         1. T dated guy, dumped him, he went to counselor, confessed he was going to kill her,
         2. Counselor reported to responsible authority (campus police) but not to T, however he killed her several weeks later
         3. Professionals have a positive duty to warn victims of potential danger
      2. Smith v Jones (Canadian case)
         1. Solicitor assisted a client in defense, client charged with seven counts of rape/murder
         2. Client divulged he had planned a series of further rapes and murders
         3. Similar to Edgell (he only had concerns), here there was absolute positive certainty that he would repeat offend
         4. Solicitor divulged that information to the police
         5. Held: that disclosure was totally justifiable, there was positive certainty
   3. Australian courts have not recognised a duty to warn