

## Health Privacy and Confidentiality

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The notion that a patient has the right to maintain the confidentiality of information disclosed in the course of a therapeutic relationship with a health practitioner has been entrenched in Western civilisation for thousands of years. For the first time, however, we have begun to witness an erosion of this entitlement, especially in Australia in recent years. The Commonwealth Parliament has created a system of co-linked national electronic health records that, by virtue of new technology, permits government bodies and myriad other third parties to access and disseminate individuals' health information both lawfully and without authority, almost invariably in the absence of patients' knowledge and consent. Commonwealth legislation has also facilitated the substitution of patients' traditional right to confidentiality of their health information with a much broader and less clearly defined right to 'personal privacy'. This chapter examines how these changes have led to a fundamental upheaval of longstanding understandings about the protection of information communicated and learned in the once secluded space of the consulting room.

### Changes to patients' historical right to confidentiality of their health information

The substance of conversations between patient and doctor in the context of the therapeutic relationship is inherently highly personal. Historically, such information about individuals' medical and psychiatric problems and conditions was locked inside the clinical notes of health providers and protected by the medical duty of confidentiality. For the past 2500 years, physicians in the Western medical tradition<sup>1</sup> have been subject to the Hippocratic Oath,<sup>2</sup> the penultimate clause of which imposes on them a duty to keep to themselves all that they observe or become aware of in relation to their patients.<sup>3</sup>

1 See Danuta Mendelson, 'Medical Duty of Confidentiality in the Hippocratic Tradition and Jewish Medical Ethics' (1998) 5(3) *Journal of Law and Medicine* 227.

2 'What I see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about': *Hippocratic Writings* (J Chadwick and WN Mann (trans), GER Lloyd (ed)) (Penguin Books, Harmondsworth, 1983).

3 Mendelson, above n 1.

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