Legal Ethics in Healthcare: Law Enforcement Response

Reading time:
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From time to time, healthcare practitioners are asked to respond to requests from law enforcement agencies. These requests can relate to urgent patient medical information or statements about the cause of injury/trauma and/or death and include relevant supporting documentation. The information that is ultimately provided needs to be accurate, factual, compatible with the GP's qualifications, training, and experience and in accordance with the law to minimise the potential for any medico-legal concerns.

The AMA Code of Conduct requires medical practitioners to maintain a patient's confidentiality, noting some exceptions such as:

- If there is a serious risk to the patient or another person
- Where required by law
- Where part of approved research
- Where there are overwhelming societal interests

At common law, medical practitioners owe a duty of confidentiality to their patients in relation to information obtained as part of the therapeutic relationship. This is not an absolute duty and there are some exceptions. For example:

- If the patient waives their right to confidentiality
- If there is a statutory or lawful excuse
- When it is in the public interest to disclose the information.

There are also legislative requirements which impose obligations in relation to the disclosure, or not, of patient information. There is a consensus in the legislation that information can only be disclosed if the following conditions are met:

- The patient consents to the release of information
- Release occurs in connection with the administration of health legislation
- Release under subpoena in legal proceedings
- Another lawful excuse, such as public policy/interest

Can you keep a secret

Whilst medical practitioners are legally and ethically bound to 'keep a secret', to what extent can medical practitioners disclose information to third parties (eg Police) if there has been an admission of a crime in the course of a medical consultation? Generally speaking, it is illegal to withhold information from Police concerning the commission of a crime. In NSW, it is an offence to conceal a serious indictable offence (examples include murder, sexual assault, dangerous driving occasioning death or grievous bodily harm) This applies if:

- A serious indictable offence has been committed; and

- A person knows or believes that it has been committed; and
- A person has information that might assist in the apprehension, prosecution or conviction of the offender; and
- The person fails, without reasonable excuse, to bring the information to the attention of the police or other appropriate authority.

However, to prosecute a medical practitioner, psychologist or nurse thought to be withholding such information, which has been formed or obtained from information in the course of practising in that professional context, consent is first required from the Attorney General. The Attorney General will decide whether it is in the public interest to prosecute the individual under the relevant section of the Crimes Act (NSW). Commentary in relation to this provision, particularly from the Law Reform Commission, indicates it is likely to be determined it would not be in the best interests of the public to prosecute a doctor, nurse or psychologist for not breaching their duty of confidentially.

It is recognised that the therapeutic relationship is best served by patients being forthcoming with information about their personal circumstances and this is likely to be seriously compromised if patients know their clinician may be charged with an offence for withholding information obtained from them. Whilst this addresses at least generally, the position for clinicians in the criminal jurisdiction, what is the position in the civil jurisdiction – can clinicians be sued for damages for failing to disclose confidential information? Whilst there is no simple answer to this question, there is a case which provides some insight into the steps that should be taken when a medical practitioner is faced with a doctor – patient confidentially conundrum.

Case study

PD v Harvey [2003] NSWSC 487

In 2003, a GP was sued for failing to disclose to a patient that her future husband was HIV positive. Prior to the upcoming wedding, the future wife (PD) and the future husband (FH) attended their GP together to obtain health checks, including STI checks. PD was a virgin and FH was not. Following the checks and in separate consultations with PD and FH, the GP advised PD that she did not have any STIs and advised FH he was HIV positive. FH subsequently provided PD with fraudulent test results. PD and FH were married. PD contracted HIV. PD then sued the GP and the practice for, among other things, failing to disclose FH's negative test results to her. The Court found that it is appropriate for a GP to counsel a patient with HIV and attempt to persuade that patient to inform other persons who may be at risk of infection. The GP was not obliged to inform persons at risk of infection (eg PD), as this would be contrary to doctor-patient confidentiality obligations. If the GP had jointly discussed with PD and FH, who would be given the test results and if their joint consent to disclosure had been obtained during that discussion, the GP and medical practice would have been authorised to provide PD with FH's test results.

Take home messages

The principal exception to a clinician's duty of confidentiality is when there is a serious risk of immediate harm to the patient or a third party. When considering whether a clinician should disclose information which is confidential, serious thought needs to be given to the following:

- The seriousness of the offence involved;
- Level of public risk – is there a risk of harm; and
- The impact the disclosure will have on the patient
- If you find yourself in circumstances similar to those outlined above and you are unsure as to your obligations, call your adviser at MIPS to seek guidance and direction.

Further reading

Rogers v Whitaker (1992) 175 CLR 479 at 483

Health Records and Information Privacy (HRIP) Act 2002 (NSW)

Mental Health Act 2007 (NSW)

Public Health Act 2010 (NSW)

Privacy Act 1988 (CTH)

Children and Young Persons (Care and Protection) Act 1998 (NSW)

Section 316 of the Crimes Act 1900 (NSW)

A serious indictable offense means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more

See Section 316(4) and the Crimes Act (NSW) regulations for full list

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