



Australian Government

Office of the Australian Information Commissioner

Our reference: D2016/007461

Senator Linda Reynolds
Acting Chair
Community Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Reynolds

Inquiry into the National Cancer Screening Register Bill 2016

Thank you for the opportunity to appear before the Community Affairs Legislation Committee on Thursday 29 September 2016.

At the hearing I was asked to take two questions on notice. My responses to those questions are attached.

Yours sincerely

Timothy Pilgrim ~~PSM~~
Australian Privacy Commissioner
Acting Australian Information Commissioner

6 October 2016

Senate Community Affairs Legislation Committee

Answers to questions on notice – Public hearing 29 September 2016

Question 1 (Hansard reference page 32)

Senator Siewert:

- Do you consider the sort of penalty range – about \$21,500, once you look at the units and all that sort of thing – adequate?

Answer

The current penalty provisions in the *National Cancer Screening Register Bill 2016* (the Bill) are consistent with those in the *My Health Records Act 2012* (My Health Records Act) and the *Healthcare Identifiers Act 2010* (HI Act).

The penalty provisions in the Bill for situations where a person makes a record of, discloses or uses 'protected information' in a manner not authorised by clause 17 are imprisonment for 2 years or 120 penalty units (currently equal to \$21,600) or both.

Under section 4B(3) of the *Crimes Act 1914*, a court can impose a penalty of five times that amount for a body corporate. Therefore, if a body corporate was found to have handled 'protected information' in a manner not authorised by clause 17 of the Bill, it could be subject to a penalty of up to \$108,000.

Section 59(3) of the My Health Records Act, imposes a penalty of imprisonment for 2 years or 120 penalty units, or both where a person contravenes sections 59(1) or (2) of the My Health Records Act. In addition, a person could be liable to a civil penalty of 600 penalty units if the person contravenes subsection (1) or (2).

Similarly, the HI Act includes penalties for unauthorised uses and disclosures of healthcare identifiers and other information obtained under the HI Act. Section 26 of the HI Act imposes a criminal penalty of imprisonment for 2 years or 120 penalty units, or both, as well as a civil penalty of 600 penalty units.

I would also like to reiterate to the Committee that, as the Australian Privacy Commissioner, I have a range of regulatory powers relating to interferences with privacy – including the power to conduct assessments, investigate potential breaches of privacy, accept enforceable undertakings by agencies and organisations and make a determination which is enforceable in the Federal Court.

When resolving an individual privacy complaint, the OAIC's preferred method is to conciliate between parties, which may result in the parties agreeing to outcomes such as an apology, a change in practice, and/or financial compensation. However, if a conciliated outcome cannot be reached I can determine privacy complaints and stipulate what the entity must do by way of remedy which could include similar outcomes. Further, if the complaint reveals a serious or repeated breach by the organisation or agency involved, I can also apply to the court for civil penalties of up to \$1,800,000.

Question 2 (Hansard reference pages 34-35)

Acting Chair (Senator Reynolds): In summary

- Could you provide some more information to the Committee about adding an additional provision to the Bill that states that a breach of the National Cancer Screening Register Act is an interference with privacy for the purposes of the Privacy Act?

Answer

Most relevantly, the *My Health Records Act 2012* (My Health Records Act) and the *Healthcare Identifiers Act 2010* (HI Act) contain provisions that detail how those Acts operate in conjunction with the *Privacy Act 1988* (Privacy Act). Those provisions make it clear that a breach of the specific information handling requirements of those Acts is an interference with privacy for the purposes of the Privacy Act and can therefore be investigated by the Information Commissioner under the Privacy Act.

Set out below are examples of how these two Acts reference the interaction with the Privacy Act.

My Health Records Act 2012

Division 4 - Interaction with the Privacy Act 1988

Section 72 - Interaction with the Privacy Act 1988

An authorisation to collect, use or disclose health information under this Act is also an authorisation to collect, use or disclose the health information for the purposes of the Privacy Act 1988.

Section 73 - Contravention of this Act is an interference with privacy

(1) An act or practice that contravenes this Act in connection with health information included in a healthcare recipient's My Health Record or a provision of Part 4 or 5, or would contravene this Act but for a requirement relating to the state of mind of a person, is taken to be:

(a) for the purposes of the Privacy Act 1988, an interference with the privacy of a healthcare recipient; and

(b) covered by section 13 of that Act.

(2) The respondent to a complaint under the Privacy Act 1988 about an act or practice, other than an act or practice of an agency or organisation, is the individual who engaged in the act or practice.

(3) In addition to the Information Commissioner's functions under the Privacy Act 1988, the Information Commissioner has the following functions in relation to the My Health Record system:

(a) to investigate an act or practice that may be an interference with the privacy of a healthcare recipient under subsection (1) and, if the Information Commissioner considers it appropriate to do so, to attempt by conciliation to effect a settlement of the matters that gave rise to the investigation;

(b) to do anything incidental or conducive to the performance of those functions.

(4) The Information Commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of his or her functions under subsection (3).

Note: An act or practice that is an interference with privacy may be the subject of a complaint under section 36 of the Privacy Act 1988.

In addition to this, section 79 of the My Health Records Act specifies that the Information Commissioner is an authorised applicant in relation to the civil penalty provisions of this Act, and sections 80 and 81, which relate to enforceable undertakings and injunctions respectively, explain that the Information Commissioner is an authorised person in relation to the provisions of the Act.

Healthcare Identifiers Act 2010

Part 4 - Interaction with the Privacy Act 1988

Section 29 - Functions of Information Commissioner

Breach of this Act is an interference with privacy

(1) An act or practice in connection with a healthcare identifier of a healthcare recipient or an individual healthcare provider that contravenes this Act or the regulations, or would contravene this Act or the regulations but for a requirement relating to state of mind, is taken to be:

(a) for the purposes of the Privacy Act 1988, an interference with the privacy of the healthcare recipient or individual healthcare provider; and

(b) covered by section 13 of that Act.

Note: The act or practice may be the subject of a complaint under section 36 of that Act.

(2) For the purpose of applying Part V of that Act (Investigations) in relation to the act or practice, treat a State or Territory authority as if it were an organisation (within the meaning of that Act).

Assessment by Information Commissioner

(3) For the purpose of paragraph 33C(1)(a) of the Privacy Act 1988, a healthcare identifier of a healthcare recipient or of an individual healthcare provider is taken to be personal information.

In addition to this, section 31C of the HI Act explains that the Information Commissioner is an authorised applicant in relation to the civil penalty provisions of the HI Act and regulations. Similarly, section 31D, relating to enforceable undertakings, and section 31E, relating to injunctions, specify that the Information Commissioner is an authorised person in relation to the provisions of the HI Act and regulations.