



My Health Records Amendment (Strengthening Privacy) Bill 2018

Submission to the Senate Community Affairs
Legislation Committee

10 September 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Senate Community Affairs Legislation Committee inquiry into the *My Health Records Amendment (Strengthening Privacy) Bill 2018*.
2. In principle the ALA supports the My Health database, given the medical value of the collated health information that will be contained in a My Health Record. The ALA welcomes the amendments to the *My Health Record Act 2012* to:
 - a. Remove the ability of the My Health Record System Operator to disclose health information in My Health Records to law enforcement agencies and government agencies without an order by a judicial officer or the healthcare recipient's consent; and
 - b. Require the System Operator to permanently delete health information stored in the National Repositories Service for a person if they have cancelled their registration with the My Health Record System.
3. However, the ALA is concerned about the potential misuse of such highly personal medical information when such information is collated and stored in a central database for long periods. In particular the ALA submits that additional protections are needed in legislation to ensure that individuals cannot be coerced into providing access to their medical records when applying for employment or seeking insurance products.

The issue of coerced consent

4. While the ALA supports the proposed amendments to the *My Health Record Act 2012* to ensure that no health record can be released to police or government agencies, for any purpose, without a court order, the announced amendments only go partway to addressing the ALA's concerns. The ALA is concerned that there are inadequate measures in place to protect the medical records in the My Health database from 'coercive sharing', where individuals may be coerced into providing access to their medical records when applying for employment or seeking insurance products.
5. The ALA is concerned that employers who have an interest in the physical and mental health of their employees may ask or demand that the employee or prospective employee divulge

their My Health Record login details. The employer may seek to justify the intrusion into the employee's privacy by pointing to the need to protect from medically-based, erratic work performance. Many employers could concoct reasons to justify why they need to see medical records, resulting in employees becoming vulnerable to intrusive requests and feeling coerced to provide access to their online health records.

6. The ALA remains concerned that there is nothing in the legislation that prevents a potential employer from demanding a job applicant provide her/his login details, for access to the applicant's My Health Record, as a pre-condition for being considered for an employment position.
7. In addition, the ALA is concerned that there is nothing in the legislation that prevents an insurance company from insisting on access to a customer's lifetime of medical records as a condition for providing health insurance, life insurance or income protection insurance. The ALA is concerned that insurance companies will require potential customers to provide access to their My Health Records as a condition of insurance, with a risk that any person whose My Health Record discloses a slightly higher than average risk in their medical history will be denied access to insurance.

Protections under the *Healthcare Identifiers Act 2010*

8. Under s14(2) of the *Healthcare Identifiers Act 2010* (Cth) (HIA) a healthcare provider or operator is not authorised to collect, use or disclose a healthcare identifier, including access to an individual's My Health Record, for the purposes of:
 - (a) underwriting a contract of insurance that covers the healthcare recipient; or
 - (b) determining whether to enter into a contract of insurance that covers the healthcare recipient (whether alone or as a member of a class); or
 - (c) determining whether a contract of insurance covers the healthcare recipient in relation to a particular event; or
 - (d) employing the healthcare recipient.

9. Under s26 of the HIA, unauthorised disclosure of a healthcare identifier is an offence and subject to a maximum penalty of two years imprisonment for a natural person or a civil penalty of up to \$126,000 for bodies corporate.
10. While the HIA provides for severe penalties for unauthorised disclosure of My Health Record files and information, it does not address the scenarios detailed above in paragraphs 4-7 in relation to the possibility of 'coercive sharing'. In these situations an individual is coerced to divulge their log in details to enable access to their My Health records, in order to seek insurance protection or to apply for or maintain employment.
11. The ALA therefore submits that it is necessary to provide further legislative protection against the 'coercive sharing' practice, by making it an offence for any person or entity to make it a condition of providing insurance, employment or other benefit or service that a person provide access in any way whatsoever to their My Health Record. The ALA submits that in order to secure public trust in the security, integrity and privacy of the My Health Record system, non-medical requests for access must be prohibited.
12. The ALA further notes that while s14(2) states that certain forms of disclosure by a healthcare provider or operator are not authorised, it does not expressly prohibit the use of that information if there has been unauthorised disclosure. While the disclosure of the information to an insurer is not authorised, and is subject to penalties under s26 of the HIA, there is no prohibition on an insurer using the information that is the subject of the unauthorised disclosure, nor are there any penalties attaching to such usage.
13. The ALA recommends that the HIA be amended to include a prohibition on the use of information that has been the subject of unauthorised disclosure, subject to penalties similar to s26.
14. The ALA also notes that under the HIA there is no requirement to notify an affected individual regarding disclosure of their medical records. The ALA considers that unless an affected person is alerted to the fact that there has been a disclosure of their health records, it is highly unlikely that any complaint will be made regarding the question of whether such disclosure was authorised. Consequently, it will be highly unlikely for any action to be taken in respect of a disclosure that may in fact be unauthorised, or for the use of information that is the subject of that unauthorised disclosure.

15. The ALA recommends that the HIA be amended to provide that where there has been any disclosure of health records, the affected individual(s) must be alerted to that fact.

Conclusion

16. The ALA welcomes the opportunity to have input into the Senate Community Affairs Legislation Committee inquiry into the *My Health Records Amendment (Strengthening Privacy) Bill 2018*. The ALA reaffirms its support for the My Health Record system. However, the ALA submits that there is a need for additional protections within the legislation to ensure that there is no abuse of access to My Health Records, particularly through practices involving 'coerced consent' to provide access in order to secure insurance products or to apply for or maintain employment.
17. The ALA also submits that the *Healthcare Identifiers Act 2010* (Cth) should be amended to prohibit the use of any information that is the subject of an unauthorised disclosure under s14(2), and to provide that where there has been any disclosure of health records, the affected individual(s) must be alerted to that fact.