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Committee Secretary
Community Affairs References Committee
& Community Affairs Legislation Committee
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Committee Secretary

**Inquiries into: My Health Record system & My Health Records Amendment
(Strengthening Privacy) Bill 2018**

Thank you for the opportunity to provide a submission to the inquiries into the My Health Record system and the My Health Records Amendment (Strengthening Privacy) Bill 2018 (bill).

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Our Occupational Discipline Law and Criminal Law policy committees have serious concerns with section 70 of the current *My Health Records Act 2012* (the **MHRA**). This section allows for information included in a person's "My Health Record" to be obtained by police without a warrant and without the consent or knowledge of that person. It would also appear that an enforcement body investigating misconduct, or any other matter which attracts a penalty or sanction, may also be able to obtain this information, again without a warrant or consent. "Enforcement body" is given the same meaning as in the *Privacy Act 1988*, which includes an extensive list of bodies including:

- (f) *another agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law; or*
- (n) *a State or Territory authority, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law.*

Allowing the use and disclosure of personal information in this way is quite contrary to the fundamental tenants of our legal system. QLS has particular concerns with the privacy implications of such disclosure of personal information and further has concerns that a provision of this nature could be misused by law enforcement authorities as a basis to

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circumvent the ordinary requirements to otherwise obtain search warrants where there is a suspicion of the commission of a criminal offence. QLS is of the view that the objects of the act do not outweigh the imposition of the individual liberties of private citizens in such circumstances, particularly the imposition on an individual's right to privacy

Accordingly, we support the objectives of the Bill and the review into the system. However, we query whether proposed section 69A in the amending bill is the appropriate remedy for the issues outlined above, given that it is unclear whether the process under this section is to apply in addition to a process for obtaining records that an agency may also follow under its own legislation.

The Explanatory Memorandum provides that this section reflects the policy of the Australian Government that no My Health Record Information will be released to law enforcement agencies or government bodies without a warrant or court order. It is unclear whether an application would still need to be made under this section in circumstances where a body already requires a warrant (notwithstanding the current section 70) to obtain a person's personal information. This question must be considered in the context that this is Commonwealth legislation and state agencies will have their own state-based schemes.

There are arguments both for and against this possible duplication of requirements to obtain this information. On the one hand, the requirements under proposed section 69A for an agency to apply to a judicial officer, and satisfy that judicial officer of the need for the disclosure in light of the privacy of the healthcare recipient is an appropriately high test.

Another view is that this section will create an additional power for someone (an agency or law enforcement body) to obtain records. The view of some of our members is that there should be only one means for an agency or regulator to obtain evidence, and that power should remain under legislation relevant to the particular agency or regulator. The powers of regulators should not be inadvertently widened or extended under this legislation unless there is a deliberate intention of the legislator to provide this additional means of access. The objects of legislation centre around public safety on the basis that access to information by health professionals benefits the individual in regards to health care.

If the policy intent of these amendments is for any agency to obtain a person's My Health Record via this process, regardless of the agency's own, preexisting process, then section 69A should be amended to clarify this.

We urge the Committee to give careful consideration to these issues.

A related issue for consideration is whether these records should, in fact, be subpoenaed. There are certain records immune from subpoena including some Centrelink and ATO records. The public policy behind this immunity could apply also to a central register of medical records. That is, if someone consents to the government holding their medical history, they are doing so in order that the information can be used for their benefit (as stated above). They should not be deterred by fears that the information could be used against them, or against someone else against their wishes.

We suggest that the Committee give this issue consideration also, noting the distinction between access to private doctors' records and a central government register.

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Domestic and family violence, persons with disability and elder abuse

We also note the concerns that have been raised in relation to the potential for information held in a "My Health Record" to be accessed by perpetrators of domestic violence and for this to be used against victims. In effect, the potential for unauthorised access to occur and for information to be misused represents a possible avenue for a new form of abuse.

Our Domestic and Family Violence policy committee requests that the Committee consider this issue in its inquiry pursuant to calls for this issue to be included in the Government's review of this legislation.

A significant concern is that the scheme could allow any parent with parental responsibility to create and access a My Health Record. This would mean that, in circumstances where a woman has left a violent relationship and has opted out of the scheme, her former partner could nonetheless register the children and obtain access to health information including visits to the doctor, medications purchased and the like. This not only provides a perpetrator of domestic violence with access to general information, which may be used to instil fear, but acts as a means of exercising ongoing control.

Children's rights are also possibly infringed where information about children is accessible by parents. Again, this is particularly concerning where a child has been subject to domestic and family violence. At present, children from 14 years on are generally able to access medical advice confidentially, without parental permission or consent. Advice may be sought in relation to contraception, termination of pregnancy or mental health. For some children, this access is vital to their safety and wellbeing. We submit that these health issues be taken into account when considering this policy.

Finally, perpetrators of domestic violence can be manipulative and persistent in their abuse and control over victims. In rare circumstances, information held by various government departments, including Centrelink and police, about a victim of family violence can be obtained by a perpetrator via hacking or corruption of government officers who have access to the information.

Similarly, there are concerns for the potential abuse of vulnerable older persons or people with disability in relation to access to or creation of a My Health Record by a person claiming to be responsible for, or acting on behalf of the older person or person with a disability. Whilst some protection arises by the existence of an enduring document or guardianship arrangement, it is unclear whether proof of one of these is required before access is granted or a My Health Record created on behalf of another.

Also, section 6(4)(b) of the MHRA is of particular concern, as it permits the System Operator to determine any such person to be the authorised representative of the healthcare recipient. There is insufficient guidance to understand the degree of verification which must be undertaken by a System Operator in the process of determining if it is appropriate for a person to be an authorised representative, for example, to what degree the System Operator is obliged to investigate and verify if an enduring power of attorney exists. We submit that this needs to be reviewed to ensure that a person who does not have the appropriate authority to act on behalf of an older person (with or without impaired capacity), or a person with a disability, is not improperly appointed as an authorised representative.

We request that these issues be carefully considered by the Committee and appropriate recommendations made to the Government and System Operator that will protect victims of family violence.

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If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Kate Brodnik

Yours faithfully

Ken Taylor
President