

Senate Community Affairs Legislation Committee

Inquiry into the My Health Records Amendment (Strengthening Privacy) Bill 2018

SEP
2018

Purpose of this submission

The Pharmaceutical Society of Australia (PSA) makes this submission to the Senate Community Affairs Legislation Committee on the inquiry into the *My Health Records Amendment (Strengthening Privacy) Bill 2018* (the 'Bill').

About PSA

PSA is the peak national professional pharmacy organisation representing Australia's 30,000 pharmacists¹ working in all sectors and locations.

PSA's core functions include:

- providing high quality continuing professional development, education and practice support to pharmacists
- developing and advocating standards and guidelines to inform and enhance pharmacists' practice
- representing pharmacists' role as frontline health professionals.

PSA is also a registered training organisation and offers qualifications including certificate and diploma-level courses tailored for pharmacists, pharmacy assistants and interns.

¹ Pharmacy Board of Australia. Registrant data. Reporting period: 1 Apr 2018 – 30 Jun 2018. At: www.pharmacyboard.gov.au/About/Statistics.aspx

Background

PSA understands this Bill proposes amendments to the *My Health Records Act 2012* (the 'MHR Act') in response to concerns raised by stakeholders, following the transition to, and commencement of, the opt-out period. A particular aspect of concern is that the MHR Act authorises the release of information to law enforcement agencies and other government bodies for certain purposes (e.g. for the investigation of a criminal offence). The Australian Digital Health Agency (ADHA) issued a policy statement that it had not and would not release any information to such bodies without a court order.

The Bill will amend the MHR Act to strengthen the privacy framework of the My Health Record (MHR) system, specifically by:

- removing the ability of the MHR System Operator (i.e. the ADHA) to disclose health information in MHRs to law enforcement and government agencies without an order by a judicial officer or the healthcare recipient's consent, and
- requiring the System Operator to permanently delete from the National Repositories Service any health information about a healthcare recipient who has cancelled their MHR.

The Bill will therefore effectively provide for the following²:

...that health information can only be collected, used or disclosed for healthcare purposes, with the healthcare recipient's consent, in response to a court order or an order by a judicial officer, to respond to public health or safety threats, for medical indemnity claims, or in order to operate the My Health Record system.

Interface with privacy legislation

The professional practice of pharmacists is underpinned by a comprehensive legal framework. As with all health practitioners, pharmacists have a range of legislative obligations relating to the collection, use or disclosure of personal and health information. These include compliance with the Commonwealth *Privacy Act 1988* (the 'Privacy Act') as well as other laws for purposes such as the supply of therapeutic products or mandatory reporting of registered health practitioners.

Some elements of the MHR Act relate to, or are dependent on, provisions in privacy legislation. For example, PSA notes Division 4 of the MHR Act outlines the interaction of that Act with the Privacy Act.

Implications for pharmacists

When considering how changes to the MHR Act might impact on pharmacists' practice, the following scenarios surrounding the interpretation and operation of the Privacy Act were raised with PSA.

Exceptions in the Privacy Act

The Privacy Act provides for a number of exceptions – categorised as 'permitted general situations' or 'permitted health situations' – where use or disclosure of personal or health information is not regarded as a breach. For example, a permitted general situation could be where there is "a serious threat to

² House of Representatives, The Parliament of the Commonwealth of Australia. My Health Records Amendment (Strengthening Privacy) Bill 2018. Explanatory memorandum. At: https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=r6169

life, health or safety of any individual, or to public health or safety". In such a situation, disclosure of personal information would not be a breach of Australian Privacy Principle (APP) 6 if:

- it is unreasonable or impracticable to obtain the individual's consent, and
- there is reasonable belief that the action is necessary to lessen or prevent the threat to life, health and public safety.

While the Bill suggests the MHR Act will provide for the ability to respond to "public health or safety threats", it is not clear whether it extends to situations involving a serious threat to life, health or safety of an individual. It is important that the exceptions contained in the Privacy Act relating to use and disclosure of health information by pharmacists and other health professionals are not impacted and PSA seeks clarification in this regard.

Law enforcement activity

In the context of APP 6, PSA's advice to pharmacists includes that disclosure of a person's health information (from pharmacy records) can occur if the pharmacist is convinced the disclosure is genuinely needed for a law enforcement activity.³

From time to time, pharmacists receive requests from law enforcement officers to provide information about a person (e.g. a patient who has received health care from a community pharmacist), for example, in connection with intelligence gathering activities to prevent, detect or investigate a criminal offence, or in the investigation of a death. In these circumstances, pharmacists may reasonably believe that the disclosure of health information is permitted under the Privacy Act.

Given the amendment to the MHR Act will remove the ability of the MHR System Operator to disclose health information to law enforcement agencies without a judicial order or the individual's consent, PSA seeks clarification on pharmacists' obligations in similar situations.

Continuity of care

Another scenario that pharmacists may face is when a request for information made by a law enforcement officer relates to an aspect of a person's ongoing care. Guidance provided to pharmacists on the interpretation and operation of APP 6 under the Privacy Act is that health information (contained in pharmacy records relating to the provision of a health-related service) can be disclosed if a professional judgement is made that it is necessary for the patient's continuity of care.⁴ A real-life example is where a police officer enters a community pharmacy and enquires whether or not a particular person (who is in police custody) has already received their daily methadone dose.

Summary

PSA supports measures to strengthen the privacy framework of the MHR system.

One of the proposed amendments of the Bill is to remove the ability of the MHR System Operator to disclose health information in MHRs to law enforcement and government agencies without an order by a judicial officer or the healthcare recipient's consent. It is not clear to PSA whether similar limitations will be applied to participants in the MHR system such as pharmacists.

³ The Pharmacy Guild of Australia and Pharmaceutical Society of Australia. Privacy and pharmacy: what does it mean for you? 2014;Mar.

⁴ The Pharmacy Guild of Australia and Pharmaceutical Society of Australia. Privacy and pharmacy: scenarios. 2014;Mar.

If similar limitations on disclosure of health information apply to pharmacists, PSA believes this may have a flow-on impact on the interpretation and operation of the Privacy Act, in particular, with regards to disclosure of information for law enforcement activities.

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