

To: Professor John McMillan
Department of Health
ACT, Australia

From: Dr Bernard Robertson-Dunn
Board Member and Chair, Health Committee
Australian Privacy Foundation

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Subject: Legislative review of My Health Records Act 2012

The stated aim of the Review is to determine how well the Act is supporting the operation of the MHR system.

Our comments will be limited to the theme “Should the prohibited purposes provision (section 71) in the MHR Act be amended to reduce the adverse impact on health practitioners?”

In the opinion of the APF, the Act does nothing to protect the privacy of patient information stored in, and made available from, MHR. This impacts both health practitioners and those registered for a MHR.

The reason for this is due to the consequences of Section 71 “Prohibitions and authorisations limited to health information collected by using the My Health Record system”.

Section 71 of the Act (see below) limits legislative protection to data collected explicitly and solely for MHR. Most data in MHR either comes from or has been transferred to other systems. They take the form of primarily of test results and various summaries uploaded and/or downloaded by healthcare providers. It also contains PBS and MBS data from Federal government sources.

This means that the Act does not apply to those data.

Section 71 restricts the legislative protection of a patient’s privacy to only a very small amount of data in MHR – primarily, the contents of a Personal Health Summary, and an Advanced Care Directive. All other medical data is unprotected by the MHR legislation.

Section 71 impacts more than just health practitioners, it means that patients are afforded little or no protection under the Act.

The MHR website says:

Increased penalties for misuse of information

Harsher fines and penalties will apply for inappropriate or unauthorised use of information in a My Health Record. Civil fines have been increased to a maximum of \$315,000, with criminal penalties including up to 5 years’ jail time.

www.myhealthrecord.gov.au/about/legislation-and-governance/summary-privacy-protections

The government gives the impression that the ACT provides strong protection to patient information, however, a Google search for the phrase “Section 71” in www.myhealthrecord.gov.au returns one hit in the document “Privacy Impact Assessment Report – Personally Controlled Electronic Health Record (PCEHR) System Opt-Out Model”

- (f) The effect of section 71(4) of the PCEHR Act is that information may be obtained from the PCEHR system, stored elsewhere and then collected, used and disclosed from that other source without restriction under the PCEHR Act. However, the collection, use and disclosure of the information will continue to be subject to other existing laws of the Commonwealth, states or territories, including the Privacy Act and health records legislation. It will also continue to be subject to any professional obligations that apply – e.g. to treating healthcare providers.

This paragraph is in complete agreement with our opinion, but, more importantly, it means that nowhere on the MHR website does it inform consumers of the content of this paragraph.

Section 71 vitiates the Act and shows that the government's claims about protecting patient information in MHR and penalties for misuse of information are deceptive and exaggerated.

Unless and until section 71 is removed completely, any discussion or analysis of the remainder of the Act is futile. If the removal of Section 71 is not possible, then it calls into question the relevance and effectiveness of the Act in protecting the privacy of Australians who have a MHR.

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Attachment, Section 71.

71 Prohibitions and authorisations limited to health information collected by using the My Health Record system

(1) The prohibitions and authorisations under Divisions 1 and 2 in respect of the collection, use and disclosure of health information included in a healthcare recipient's My Health Record are limited to the collection, use or disclosure of health information obtained by using the My Health Record system.

(2) If health information included in a healthcare recipient's My Health Record can also be obtained by means other than by using the My Health Record system, such a prohibition or authorisation does not apply to health information lawfully obtained by those other means, even if the health information was originally obtained by using the My Health Record system.

Information stored for more than one purpose

(3) Without limiting the circumstances in which health information included in a healthcare recipient's My Health Record and obtained by a person is taken not to be obtained by using or gaining access to the My Health Record system, it is taken not to be so obtained if:

- (a) the health information is stored in a repository operated both for the purposes of the My Health Record system and other purposes; and*
- (b) the person lawfully obtained the health information directly from the repository for those other purposes.*

Note For example, information that is included in a registered healthcare recipient's My Health Record may be stored in a repository operated by a State or Territory for purposes related to the My Health Record system and other purposes. When lawfully obtained directly from the repository for those other purposes, the prohibitions and authorisations in this Part will not apply.

Information originally obtained by means of My Health Record system

(4) Without limiting the circumstances in which health information included in a healthcare recipient's My Health Record and obtained by a person is taken not to be obtained by using or gaining access to the My Health Record system, it is taken not to be so obtained if:

- (a) the health information was originally obtained by a participant in the My Health Record system by means of the My Health Record system in accordance with this Act; and*
- (b) after the health information was so obtained, it was stored in such a way that it could be obtained other than by means of the My Health Record system; and*
- (c) the person subsequently obtained the health information by those other means.*

Note: For example, information that is included in a registered healthcare recipient's My Health Record may be downloaded into the clinical health records of a healthcare provider and later obtained from those records.

Australian Privacy Foundation Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby AC CMG and The Hon Elizabeth Evatt AC, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <https://privacy.org.au/publications/by-date/>
- Media <https://privacy.org.au/home/updates/>
- Current Board Members <https://privacy.org.au/about/contacts/>
- Patron and Advisory Panel <https://privacy.org.au/about/contacts/advisorypanel/>

The following pages provide outlines of some of the campaigns that the APF has conducted:

- The Australia Card (1985-87) <https://privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <https://privacy.org.au/campaigns/consumer-credit-reporting/>
- The Census (2006) <https://privacy.org.au/campaigns/census2006/>
- The Access Card (2006-07) <https://privacy.org.au/campaigns/id-cards/hsac/>
- The Media (2007-) <https://privacy.org.au/campaigns/privacy-media/>
- The MyHR (2012-) <https://privacy.org.au/campaigns/myhr/>
- The Census (2016) <https://privacy.org.au/campaigns/census2016/>