



Office of the Information Commissioner Queensland

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Health and Other Legislation Amendment Bill 2021

The Queensland Office of the Information Commissioner (**OIC**) welcomes the opportunity to provide a submission to the State Development and Regional Industries Committee (**the Committee**) on the Health and Other Legislation Amendment Bill 2021 (**the Bill**).

OIC was consulted by the Department of Health during the drafting of the Bill. OIC's comments focus on amendments contained in the Bill to the *Hospital and Health Boards Act 2011 (HHB Act)* to expand access to The Viewer to a range of health professionals who are not registered under the National Law.

The proposed amendments seek to provide access to The Viewer for an expanded range of *prescribed health professionals* who routinely work with Queensland Health during the transfer of patient care between the acute and community care settings. The stated purpose for the proposed amendments is to enable allied health professionals to have a better understanding of the care a patient has received in an acute setting, determine appropriate continuity of care and achieve better health outcomes for patients.¹ OIC notes this may include domiciliary care provided by non-government organisations and private practitioners, and non-hospital rehabilitation provided in community care facilities or in private practices.²

The broader sharing of a patient's health information with an expanded range of allied health professionals across the non-government and private sector, raises a number of privacy and data security risks and issues, including increased risk of misuse, loss and unauthorised access. Legislation authorising the use and disclosure of personal information should strike an appropriate balance to ensure any impacts on privacy are reasonable, necessary and proportionate having regard to the relevant policy objective.

About the OIC

The OIC is an independent statutory body that reports to the Queensland Parliament. We have a statutory role under the *Right to Information Act 2009 (RTI Act)* and the *Information Privacy Act 2009 (IP Act)* to facilitate greater and easier access to information held by government agencies. We also assist agencies to understand their obligations under the IP Act to safeguard personal information that they hold.

OIC's statutory functions include receiving and mediating privacy complaints against Queensland government agencies, issuing guidelines on privacy best practice,

The Office of the Information Commissioner is an independent statutory authority.

The statutory functions of the OIC under the Information Privacy Act 2009 (Qld) (IP Act) include commenting on the administration of privacy in the Queensland public sector environment.

This submission does not represent the views or opinions of the Queensland Government.

¹ Explanatory Notes at page 15

² Explanatory Notes at page 15

initiating privacy education and training, and conducting audits and reviews to monitor agency performance and compliance with the RTI Act and the IP Act. Our office also reviews agency decisions about access to, and amendment of, information.

Information Privacy Act 2009

Queensland's IP Act recognises the importance of protecting the personal information of individuals. It creates a right for individuals to access and amend their own personal information and provides rules or 'privacy principles' that govern how Queensland government agencies collect, store, use and disclose personal information. OIC has regulatory oversight of Queensland Government agencies' compliance with requirements under the IP Act.

Proposed amendments to the HHB Act

The Viewer is Queensland Health's read-only web-based application, available on desktops and mobile devices, that displays a consolidated view of patients' clinical and demographic information from a variety of Queensland Health clinical and administrative systems.

The Viewer contains a broad range of patient information including:³

- Patient demographics, admission and discharge history
- Validated pathology results and tests ordered
- My Health Record
- Mental health data
- Problems and primary diagnosis from emergency departments and hospital admissions
- Discharge summaries
- Medication profiles and adverse reactions
- Operation notes and elective surgery waitlist information
- Radiology results
- Oncology information
- Alerts
- Endoscopy reports
- Advance Care Planning/Statement of Choices documents
- Acute management plans
- Clinical reports
- Medical images.

Clause 33 of the Bill amends section 139 of the HHB Act, replacing the definition of *prescribed health practitioner* with *prescribed health professional*. This will enable allied health professionals who are not registered health practitioners under the National Law to access The Viewer and view patient healthcare information.⁴ The Bill also makes a number of consequential amendments to the HHB Act arising from the insertion of a new definition of *prescribed health professional* into part 7.

As outlined in the Explanatory Notes, if the Bill is passed and enacted, it is intended that the *Hospital and Health Boards Regulation 2012* will be amended to prescribe the

³ <https://www.health.qld.gov.au/clinical-practice/innovation/digital-health-initiatives/queensland/the-viewer>

⁴ Explanatory Notes at page 15.

types of allied health professionals permitted to access The Viewer and their qualification requirements. The Explanatory Notes state that it is intended to prescribe audiologist, social workers, dietitians, speech pathologists, exercise physiologists, orthoptists, and orthotists and prosthetists as *relevant health professionals*.⁵

It is OIC's understanding that access to The Viewer was initially granted to General Practitioners (GPs) from June 2017. In February 2020, midwives, nurses and paramedics⁶ were granted access to The Viewer and access was further extended in September 2020 to a range of allied health practitioners registered under the National Law including Pharmacy, Psychology and Occupational therapy.⁷

Privacy and Data Security Issues and Risks

As outlined previously, expanding the range of allied health professionals to provide access to more extensive patient information than is currently available poses a number of implications for a person's privacy and may not accord with contemporary community expectations regarding privacy and the handling of their personal information.

Key findings of the *Australian Community Attitudes to Privacy Survey 2020* include 87% want more control and choice over the collection and use of their personal information while 84% think it is a misuse of personal information when information is supplied for a specific purpose and used for another.⁸

Community concerns over privacy and the government's ability to protect their personal information and secondary use of data, whether real or perceived risks, have the potential to undermine community trust and confidence resulting in reduced levels of take up by the community. Increasingly, the federal and state governments are legislating strong privacy and data security protections to build trust and transparency when implementing important initiatives. Recent examples demonstrating the extent and nature of privacy protections required to be entrenched in primary legislation include the My Health Record, the COVIDSafe app and more recently, access to data collected by the Check In Qld app.

By way of example, on 26 November 2018, the Australian Parliament passed the My Health Records Amendment (Strengthening Privacy) Bill 2018. These changes were in response to the Australian community's call for even stronger privacy and security

⁵ Explanatory Notes at page 15.

⁶ On 21 February 2020, the *Health Legislation Amendment Regulation 2020* amended the *Hospital and Health Boards Regulation 2012* to enable access to the Viewer for midwives, nurses and paramedics registered under the National Law.

⁷ On 17 September 2020, the *Hospital and Health Boards (Prescribed Health Practitioners) Amendment Regulation 2020*. Amendments expanding access to The Viewer to these additional groups of health professionals was prescribed by regulation rather than in primary legislation, limiting parliamentary oversight and scrutiny of the proposed amendments to grant expanded access.

⁸ <https://www.oaic.gov.au/engage-with-us/research/australian-community-attitudes-to-privacy-survey-2020-landing-page/acaps-2020-infographic>

protections for people using My Health Record.⁹ Express legislated privacy protections include:¹⁰

- prohibition on access for insurance or employment purposes
- prohibition on release of health information to law enforcement agencies and government agencies without the express consent of the individual or a court order
- allowing individuals to permanently delete their records, and any backups, at any time
- allowing individuals to opt in or opt out of the My Health Record. An individual can cancel their My Health Record at any time. An individual who has opted out can create a My Health Record if they choose to do so.
- no commercial use of My Health Record data
- increased penalties for misuse of information, including inappropriate or unauthorised use or disclosure to a maximum of \$333,000 for individuals (\$1,665,000 for bodies corporate) with criminal penalties including up to 5 years' jail time; and
- strengthened safeguards to protect victims of domestic and family violence.

OIC notes that the My Health Records also contains a number of mechanisms to allow an individual to take steps to control their privacy by imposing limits on who has access to the record. For example, an individual can:

- decide which healthcare organisations can access their record
- choose to restrict access to specific information, or categories of information, within their record.

OIC understands that the functionality in the second dot point above is not currently available in The Viewer.

My Health Record has a range of security safeguards including allowing access logs to be viewed by the individual in their access history record. The audit log displays the name of the healthcare organisation that accessed the record, when it was accessed, the nature of the access and the role of the person who accessed the record.¹¹ OIC notes that My Health Record is a component of patient information available on The Viewer. OIC further notes the discrepancy between privacy and data security safeguards afforded by the My Health Record compared to those available for access to The Viewer.

The strengthened privacy protections and penalties for misuse of information in the My Health Record reflect the sensitivity of an individual's health information and the potential for harm to an individual or health care providers arising from misuse of a person's health information.

As noted in the Office of the Australian Information Commissioner's report for the Notifiable Data Breaches Scheme for the January to June 2021 reporting period, the health sector reported the highest number of data breaches in Australia notifying 19%

⁹ <https://www.myhealthrecord.gov.au/about/legislation-and-governance/summary-privacy-protections>

¹⁰ <https://www.myhealthrecord.gov.au/news-and-media/media-releases/opt-in-or-opt-out-any-time>

¹¹ <https://www.myhealthrecord.gov.au/for-healthcare-professionals/howtos/my-health-record-system-security>

of all breaches, followed by finance which notified 13% of all breaches. for the Notifiable Data Breaches Schemes.¹² This data highlights the vulnerability of health information to data breaches and the need for robust data security safeguards including embedding and awareness and training for all staff in use of digitised health records. Extending access to The Viewer to a network of allied health professionals across the non-government and private sector increases the risks of security incidents and data breaches, including unauthorised access. Additionally, smaller medical allied health practices access may provide vectors for cyber-attacks and create possibilities for access to records or even threaten Queensland Health ICT systems and data.

A patient's medical record may contain social or other information that a patient may not necessarily know is contained within their medical record and accessible by a broad range of health professionals. This may include highly sensitive information such as mental health history, sexual health information or history of substance abuse. It is OIC's view that not all patient information accessible through The Viewer is relevant to each of these categories of allied health professionals. For example, is it reasonable and necessary for a Social Worker to have access to patient information such as radiology results or medical images to provide social work services to a patient transitioning to, or in a community care facility? Similarly, is it reasonable and necessary for an audiologist to have access to mental health information, sexual health history or Advance Care Planning information about a patient for the purposes of providing audiology services?

Intentional misuse of personal information continues to be a significant risk to privacy. The reasons for this can be varied, but key amongst them is human curiosity. In February 2020 the Crime and Corruption Commission (CCC) tabled a public report – "Operation Impala – Report on misuse of confidential information in the Queensland public sector". The report examined the risks and causes surrounding the misuse of confidential information in the Queensland public sector. In the report the CCC noted:

Operation Impala examined the impacts of unauthorised access to and disclosure of information both on agencies and on the people whose information is accessed or disclosed to third parties without their knowledge or consent. It also sought agencies' views on why their staff continued to access information without legitimate reason to do so.

The main drivers of this behaviour were identified as personal interest (curiosity), the desire to obtain a material benefit, relationships that could make some employees more susceptible to misusing confidential information, and the personal circumstances of an individual.¹³

It is the OIC's view that the proposed amendments in the draft Bill will increase the risk that health practitioners' access to sensitive information which may not be essential to perform their work will increase the risk of misuse of patients' sensitive health information.

¹² <https://www.oaic.gov.au/privacy/notifiable-data-breaches/notifiable-data-breaches-statistics/notifiable-data-breaches-report-january-june-2021>

¹³ <https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Impala/Operation-Impala-report-on-misuse-of-confidential-information-in-the-Queensland-public-sector-v2.pdf>, page 12

It is OIC's understanding that while individuals can elect to allow or withhold their public hospital healthcare information from doctors, nurses and/or individual allied professions or professionals, an individual is unable to restrict access by an allied health professional granted access to The Viewer to specific information contained within their record. As noted earlier, this may include access to highly sensitive information that a patient does not wish to be shared with their health practitioner.

As such, OIC considers that the proposed amendments to the HHB Act do not appear to place sufficient limits or restrictions on the nature and type of information that may be accessed by the proposed expanded categories of *prescribed health professionals* nor do they provide a mechanism for an individual to exercise sufficient control over which health professionals can access their health information or specific categories of health information.

While OIC supports the policy intent underpinning the proposed amendments, OIC considers the proposed amendments in the Bill represents a significant incursion into the individual's privacy and may not be reasonable, necessary and proportionate to achieving the stated policy objectives of improved health outcomes for patients transitioning from an acute care to the community.

Strengthened Privacy and Security Safeguards

OIC understands there are a number of safeguards in place to protect the privacy of patients. These include:

- stringent registration processes to register for the Health Portal¹⁴
- user's access to and activity on The Viewer is recorded in audit files and subject to audits conducted by Queensland Health
- patient searches can only be undertaken in The Viewer based on a unique set of patient identifiers
- penalty provisions for unauthorised access, and
- professional and legal obligations of health professionals to protect the health information of their patients.

While OIC welcomes the above privacy and security safeguards, OIC considers that these safeguards could be further enhanced by adopting the following risk mitigation strategies:

- **Conducting a Privacy Impact Assessment (PIA)** on the proposal to expand access to a broader range of allied health professionals. Further, the PIAs should be updated throughout the lifecycle of the project and, in the interests of transparency and accountability, made publicly available consistent with contemporary good practice and community expectations.¹⁵ Release of the PIAs publicly, to the greatest extent appropriate, in conjunction with a comprehensive community education program about access to The Viewer is essential to build community trust and confidence.
- **Providing individuals with greater control and choice over the specific information a health professional is permitted to access.** As noted previously,

¹⁴ Explanatory Notes at page 26.

¹⁵ Noting that it may not always be appropriate to publish the full PIA.

it is OIC's understanding that currently The Viewer does not contain this functionality to restrict access to specific categories of health information.

- **Transitioning from the existing opt-out model to an opt-in model.** The existing process is for Queensland Health patients to 'opt-out' of having their public hospital healthcare information accessible through the Health Provider Portal. Opt-in is a stronger consent model than opt-out and assists in ensuring consent is informed, voluntary, current and specific and the individual has the capacity to give consent. An opt-in model is more likely to meet contemporary community expectations.
- **Embedding privacy and security awareness and training for all prescribed health professionals granted access To Viewer.** While OIC understands Health Practitioners are reminded of the Terms and Conditions of access at each log in, regular privacy and data security awareness training of health professionals obligations when accessing The Viewer minimises the risk of misuse, loss and unauthorised access.
- **Undertaking a comprehensive community awareness raising campaign regarding the proposed changes.** This will assist in ensuring community members are fully informed about the nature of patient information accessible on the Viewer, the types of patient information that may be shared with health professionals and how to exercise their existing option to manage access to their information, including to opt-out.

While OIC notes user's access to and activity is recorded in audit files and subject to audits conducted by Queensland Health, it is unclear how the audit will be conducted and how privacy or other breaches, including breaches of professional and legal requirements for accessing The Viewer, will be detected. OIC suggests greater transparency around the frequency of audits and the findings of these audits are made publicly available.

The above privacy risk mitigation strategies are not unique to the proposed amendments in the Bill which seek to expand access to allied health professionals to enable access to The Viewer. Rather they reflect fundamental principles underpinning the handling of personal information and the protection of an individual's privacy. Adoption of strong privacy and data security risk mitigation strategies will build trust and transparency in the handling of a patient's health information.

OIC remains available to assist the Committee.

Yours sincerely

Yours sincerely



Rachael Rangihaeata
Information Commissioner



Paxton Booth
Privacy Commissioner