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SUBMISSION

Wednesday, 9 October 2024

AMA submission to the Privacy and Other Legislation Amendment Bill 2024

The Australian Medical Association (AMA) acknowledges the efforts made in the Privacy and Other Legislation Amendment Bill 2024 to address prior feedback from the AMA, particularly in areas such as health research consent and the capacity of minors to consent to healthcare-related privacy matters. We appreciate the recognition of these complex healthcare privacy issues and the adjustments made in response to our earlier submissions. However, we are concerned about the potential unintended consequences from the introduction of the Statutory Tort for Serious Invasions of Privacy under Part 15 of the Bill.

Key concerns regarding the Statutory Tort for Serious Invasions of Privacy

Schedule 2 creates a new statutory tort for serious invasions of privacy that exposes healthcare providers and researchers to significant legal risks. This statutory tort operates independently of the Australian Privacy Principles (APPs) and the rest of the Privacy Act, meaning an individual or organisation can be sued under Schedule 2, even if they have complied with the Privacy Act, or are not subject to its provisions. It also introduces a dual liability system, where medical professionals may face penalties under the Privacy Act and damages under Schedule 2 for the same act of collecting, using, or disclosing personal information.

The new statutory tort's unclear scope — specifically around what constitutes "reckless" or "serious" invasions of privacy — also creates ambiguity for medical professionals, hospitals, researchers and public health bodies who routinely handle sensitive personal data. Additionally, several key exemptions that currently protect healthcare providers under the Privacy Act do not apply to the statutory tort, further increasing the risk of litigation.

Specific examples of legal risks for healthcare providers

1. Collecting family medical history without express consent

Doctors frequently rely on family medical history (such as a genetic predisposition to heart disease or mental illness) to make informed decisions. There may also be circumstances where family members provide information about a patient (e.g. they had a fall or have not been taking their medication). Currently, items 1, 1A and 5 of section 16B (permitted health situation) allow medical professionals to collect health information about a person and their family to provide a health service. There are no equivalent exceptions under new Schedule 2. This means a person could sue the doctor for recording this information without their explicit consent, even if the information is essential for treatment. This poses a risk, as healthcare professionals could face claims for actions that are routine in medical

practice. The person could also sue the family member who provided the information to the doctor as, unlike section 16 of the Privacy Act, there is no exception for disclosures in connection with a person's personal, family or household affairs.

2. Collecting reports from other specialists without express consent

Similarly, general practitioners frequently receive information from other specialists without obtaining express consent from the patient. If this information is necessary to provide a health service, this is authorised by item 1 of section 16B. As noted above, this section will not apply to the new statutory tort. This means a doctor who receives this information without verifying the patient consented to the collection is at risk of a claim that they recklessly invaded the patient's privacy.

While isolated claims are unlikely, the statutory tort introduces greater exposure to employment disputes and work health and safety claims, as seen in cases like 'CP' and Department of Defence [2014] AICmr 88, where an employee's privacy was breached by sharing an independent medical practitioner's medical report with their GP against their wishes. Under Schedule 2, doctors could be drawn into similar claims as co-defendants, even when acting in compliance with established medical practices.

3. Disclosing health information to family members or authorities

In some circumstances, doctors may also disclose patient health information to third parties without the patient's express consent on the basis they believe disclosure is in the best interest of the patient or a third party. For example, there are specific exceptions relating to disclosure of genetic information (item 4 of section 16B). There are also specific exceptions relating to scenarios where a doctor needs to tell a responsible person about the patient's medical condition so the patient can receive appropriate care or treatment (item 5 of section 16B). The new statutory tort does not contain equivalents of these provisions. This means healthcare professionals could be sued for invading a person's privacy where disclosure was necessary for patient care and did not breach the Australian Privacy Principles.

We appreciate clause 8(1)(b) provides it is a defence if "the defendant reasonably believed that the invasion of privacy was necessary to prevent or lessen a serious threat to the life, health or safety of a person". However, this is narrower than the existing exception in item 1 of section 16A (which also refers to threats to public health or safety). Moreover, if a court later determines the doctor's belief that the invasion of privacy was necessary (to prevent a serious threat to life, health, or safety) was not reasonable in the circumstances, the doctor could face a claim under Schedule 2. This raises concerns for doctors who often need to make urgent decisions based on incomplete information. While there have been instances where the Privacy Commissioner has determined a doctor should not have disclosed information about a patient to the police, the amounts awarded have been under $5,000. As discussed further below, going forward, the amounts awarded to the patient are likely to be much higher.

4. Raising concerns about colleagues

Doctors and other health professionals are legally required to raise serious concerns about other practitioners with the regulator. Mandatory reporting to Ahpra is a significant step which doctors do not take lightly. As such, there may be scenarios where a doctor wants to check with HR, a supervisor, or another doctor as to whether something should be reported. Currently, it is unlikely this would result in a claim for infringement of privacy. This is partly because the current Privacy Act does not

apply to individuals. Accordingly, any claim would have to be on the basis the doctor's employer was vicariously liable for their actions.

Unlike the current Privacy Act, Schedule 2 applies to individuals in their personal capacity. This means a doctor who discusses a concern about another healthcare practitioner with someone else (including HR) may by sued personally. As noted above, unlike the existing Privacy Act, there is no exception for public safety. There is also no requirement the individual be identifiable (as Schedule 2 is not limited to "personal information").

Supervisors or HR may also be sued by disgruntled employees if they escalate any concerns raised with them. This is because, unlike the current Privacy Act, there is no exception for employee records.

5. Medical research using personal data

Currently, medical researchers rely on items 2 and 3 of section 16B and section 95A of the Privacy Act to conduct medical research. These provisions allow researchers to conduct medical research without express consent if they have ethics approval and meet other requirements. These exceptions do not apply to new Schedule 2.

As noted above, Schedule 2 may also apply to information that has been de-identified or anonymized as it applies to all information that "relates to an individual". Unlike the existing definition of personal information, there is no requirement the individual be identifiable.

This means researchers who use patient data for medical research with ethics approval and in compliance with the Privacy Act could still be sued under the statutory tort if they lack explicit consent from the individual. This creates a significant barrier for public health research, which often relies on longitudinal data to study population health trends or genetic predispositions.

Suppression of debate and scientific research

The statutory tort also raises the potential for individuals to use privacy claims to shut down debate or criticism. For example, if the AMA or the Medical Journal of Australia publishes information about a person's or their immediate family's financial links to a health product or service, the individual could bring a claim for invasion of privacy — even if the information is accurate — on the basis individuals expect their financial affairs to remain private.

As noted above, given Schedule 2 applies to individuals in their personal capacity, an individual could also threaten to bring claims against the author, the editor, and potentially the directors and other senior officers for invasion of privacy. While employees will generally be covered by their employer's insurance, the threat of being named personally in a suit will be a strong incentive not to call out individuals (particularly high-net-worth or litigious individuals).

Unlike defamation law, truth is not a defence under Schedule 2, and there is no exception for peer-reviewed scientific journals.

Increased litigation and financial burden

The Bill caps non-economic loss at the greater of $478,550 or the maximum amount under defamation law (clause 11(5)). It also allows claims for emotional distress and punitive or exemplary damages (clause 11). The cap is more than 20 times higher than the largest amounts awarded by the Privacy Commissioner to individuals. We note also cases will now be heard in state and federal courts,

rather than by the Office of the Australian Information Commissioner (OAIC). This means cases are likely to take longer and involve more legal fees than current OAIC proceedings. While some of these legal fees may be recovered from unsuccessful plaintiffs, defendants will be unable to recover against a plaintiff with no or minimal assets.

The likelihood of more claims (particularly class actions, claims from unrepresented litigants, and pro bono matters), increased litigation costs, and the potential for larger payouts, will result in higher insurance premiums for healthcare professionals, which will ultimately be passed on as higher healthcare costs for patients.

While the Privacy and Other Legislation Amendment Bill 2024 aims to strengthen privacy protections, the introduction of the statutory tort under Schedule 2 creates substantial risks for the medical and public health sectors. The lack of clear definitions, the removal of key exemptions, and the potential for dual liability will lead to greater legal uncertainty, increased litigation, and higher operational costs for healthcare providers. These consequences will not only affect the delivery of medical care but could also stifle medical research and limit open debate in scientific publications. We respectfully request Schedule 2 is withdrawn, pending further sector and legal consultation.

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