EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 142

Healthcare Identifiers Act 2010

Healthcare Identifiers Amendment (PCEHR System Information) Regulation 2013

Subsection 39(1) of the *Healthcare Identifiers Act 2010* (HI Act) provides that the Governor-General may make regulations prescribing matters which are required or permitted by the HI Act, or matters which are necessary or convenient in order to carry out or give effect to the HI Act.

The HI Act implements a national system, the Healthcare Identifiers Service (HI Service), for assigning unique identifiers to healthcare recipients, individual healthcare providers and healthcare provider organisations for the purpose of ensuring that health information is correctly matched to an individual or entity. The HI Act sets out clear purposes for which healthcare identifiers may be collected, used and disclosed. Division 2A of Part 3 of the HI Act provides for the collection, use and disclosure of healthcare identifiers and identifying information for the purposes of the personally controlled electronic health record system (PCEHR) system.

The *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act) provides for the establishment and operation of the PCEHR system to provide access to health information relating to consumers' healthcare.

The purpose of the regulation is to amend the *Healthcare Identifiers Regulations 2010* (Principal Regulations) to support the effective operation of the PCEHR system by ensuring consumers' authorised representatives, and prospective authorised representatives, can participate in the system, and that all relevant Veterans' Affairs Department (DVA) medical, treatment and benefits information can be included in a consumer's PCEHR where the consumer consents to this occurring.

Section 22E of the HI Act provides that regulations may authorise a person to collect, use and disclose the identifying information and healthcare identifier of a healthcare recipient (or their authorised representative or nominated representative, as defined in the PCEHR Act), or a healthcare provider, as authorised by the PCEHR Act or as is reasonably necessary for the performance of a function or the exercise of a power in relation to the PCEHR system. The regulation removes any doubt that the PCEHR System Operator, the service operator and the Chief Executive Medicare are authorised to collect, use and disclose to participants in the PCEHR system the healthcare identifier and the identifying information of a person seeking to be recognised as an authorised representative of a consumer by the PCEHR System Operator. The regulation does this by prescribing each authorised entity.

Regulation 12 of the Principal Regulations currently authorises DVA to include certain information in a consumer's PCEHR where the consumer has consented to this occurring. The amendment to the Principal Regulations:

- clarifies that a class of DVA information that may be included in a consumer's PCEHR is not limited to information relating to treatment received through the Repatriation Pharmaceutical Benefits Scheme but refers to treatment received under the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*, the *Military, Rehabilitation and Compensation Act 2004*, the *Safety, Rehabilitation and Compensation Act 1988* or the *Veterans' Entitlements Act 1986*; and
- clarifies that DVA information not relating to treatment is not authorised to be included in a consumer's PCEHR.

Details of the regulation are set out in the Attachment.

Section 33 of the HI Act specifies that the Minister must consult the Ministerial Council before the Governor-General makes regulations. On 11 November 2011 the then Minister for Health and Ageing consulted the Ministerial Council on these legislative proposals and the regulation has been developed accordingly.[1]

The development of the regulation was the subject of consultation with the Veterans' Affairs Department, the Department of Human Services, the National E-Health Transition Authority, the National Health Information Regulatory Framework Working Group and Australian Health Ministers' Advisory Council Chief Executive Officers.

The HI Act specifies no other conditions that need to be met before the power to make the regulation may be exercised.

The regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The regulation commences on the day after registration on the Federal Register of Legislative Instruments.

Authority: Subsection 39(1) of the *Healthcare Identifiers Act 2010*

ATTACHMENT

Details of the *Healthcare Identifiers Amendment (PCEHR System Information) Regulation 2013*

Section 1 – Name of regulation

This section provides that the title of the regulation is *Healthcare Identifiers Amendment (PCEHR System Information) Regulation 2013.*

Section 2 – Commencement

This section provides for the regulation to commence on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Authority

This regulation is made under the *Healthcare Identifiers Act 2010.*

Section 4 – Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item [1] – Regulation 12

Healthcare recipients may wish to include in their personally controlled electronic health record (PCEHR) certain Veterans' Affairs Department (DVA) medical and claims information.

In practice, this information is provided by DVA to the Chief Executive Medicare of the Department of Human Services (DHS) for claims processing, and it is the Chief Executive Medicare, DHS, who provides this information to the PCEHR System Operator.

Existing regulation 12 authorises the inclusion of compensation and rehabilitation claims information in a consumer's PCEHR, with the consumer's consent. Although the authority exists, this information is not currently provided to or held by the Chief Executive Medicare, DHS, so it cannot be included in a consumer's PCEHR. However veterans have expressed concern about the potential for this information to be included in the future and requested that the authority be removed.

Further, existing regulation 12 does not authorise claims information under the *Australian Participants in Nuclear Tests (Treatment) Act 2006* to be included in a consumer's PCEHR, with consumer consent. This means that certain DVA

information held by the Chief Executive Medicare, DHS, cannot be included in a consumer's PCEHR as intended.

Item [1] substitutes regulation 12 with a new regulation 12 which ensures that all DVA claims information relating to treatment held by the Chief Executive Medicare, DHS, can be included in the consumer's PCEHR where the consumer consents to this occurring.

This amendment targets the specific DVA information held by the Chief Executive Medicare, DHS, which is Repatriation Pharmaceutical Benefits claims and Treatment Account Processing claims (for medical, allied health and hospital claims).

If at a future time the Chief Executive Medicare, DHS, holds additional DVA information, that additional information may not be authorised by this regulation to be included in a consumer's PCEHR (with the consumer's consent), and any legislative change will need to be the subject of consultation with DHS and DVA.

Item [2] – After regulation 14

The PCEHR system enables minors and persons without capacity to have a PCEHR through the involvement of an authorised representative. In order for a person to be recognised as an authorised representative, the PCEHR System Operator must make a decision as to whether the person meets the eligibility criteria set out in section 6 of the PCEHR Act.

The PCEHR Act and HI Act currently enable the PCEHR System Operator, the service operator and Chief Executive Medicare to collect, use and disclose identifying information and healthcare identifiers of individuals who are authorised representatives primarily for the purpose of verifying their identity. However, there is some ambiguity about whether existing provisions permit the collection, use and disclosure of healthcare identifiers and identifying information of a prospective authorised representative person – that is, a person seeking to be recognised as an authorised representative of a consumer. In order for the PCEHR system to function as intended, especially in an online environment, it is necessary that such collection, use and disclosure be permitted.

Regulation 15 clarifies that the PCEHR System Operator, the service operator and Chief Executive Medicare are authorised to collect, use and disclose to participants in the PCEHR system identifying information and the healthcare identifier of a person seeking to be recognised by the PCEHR System Operator as a consumer's authorised representative.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Healthcare Identifiers Amendment (PCEHR System Information) Regulation 2013

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulation

The Regulation makes amendments to the *Healthcare Identifiers Regulations 2010* to support the additional processes and information flows that have arisen as a result of the implementation of the personally controlled electronic health record (PCEHR) system as established by the *Personally Controlled Electronic Health Records Act 2012* (PCEHR Act).

The Regulation will:

1. clarify that if a consumer seeks to be recognised by the PCEHR System Operator as the authorised representative of another person, and register that other person for a PCEHR, the System Operator is permitted to use the identifying information and healthcare identifier of the consumer in order to verify their identity **before** deciding whether to recognise them as an authorised representative; and
2. ensure that **all** Veterans' Affair Department (DVA) information which relates to health and medical claims which is held by the Department of Human Services can be included in a consumer's PCEHR if the consumer gives consent.

Human rights implications

The Regulation engages the following human rights:

Right to Protection of privacy and reputation
Article 17 of the International Covenant on Civil and Political Rights (ICCPR) guarantees protection from unlawful interference with a person's privacy and from unlawful attacks on a person's honour and reputation.

Amendment 1 of the Regulation prescribes a circumstance, additional to those prescribed in the *Healthcare Identifiers Act 2010* (HI Act), in which identifying information and healthcare identifiers of certain persons can be collected, used and disclosed. This additional circumstance is necessary for the operation of the PCEHR system – the PCEHR System Operator cannot make a decision whether or not to recognise a consumer as an authorised representative unless their identity can be verified using this information since this would pose a risk to the security and integrity of the PCEHR system. Seeking to be recognised by the System Operator, and register another person, is voluntary. If a consumer does not want their identifying information or healthcare identifier used in this manner, they cannot be recognised as an authorised representative, however this does not affect their entitlements to healthcare, nor does it affect the entitlements of the person who they are seeking to register.

Any unauthorised collection, use or disclosure of healthcare identifiers or identifying information is subject to the penalties and remedies set out in the HI Act, PCEHR Act and *Privacy Act 1988*.

Amendment 2 of the Regulation identifies certain information that may be included in a consumer's PCEHR however the inclusion of any information in a consumer's PCEHR is subject to their consent. Consumers may choose not to include certain health information in their PCEHR – this reflects the current ability of a consumer who can choose not to share certain health information with a healthcare provider, assuring their right to privacy.

Freedom of expression
Article 19 of the ICCPR which guarantees freedom of opinion and expression, including the right to seek, receive and impart information and ideas.

The PCEHR system ensures a consumer's right to healthcare information contained in their PCEHR, and to manage access to their PCEHR. It also provides that healthcare providers may access and add to a consumer's healthcare information contained in the PCEHR system subject to the person's consent.

These arrangements are unchanged by amendment 2 of the Regulation which only specifies the type of DVA information which is available to be included in the consumer's PCEHR.

Conclusion
The amendments made by this Regulation are compatible with human rights because they advance the protection of human rights, specifically the right to privacy.

The Hon Tanya Plibersek MP

Minister for Health