

February 28, 2023

Via email: [phiareview@gov.nl.ca](mailto:phiareview@gov.nl.ca)

PHIA Statutory Review Committee  
Department Health and Community Services  
Confederation Building  
P.O. Box 8700  
St. John's, NL A1B 4J6

Dear Sir or Madam:

**Re: Newfoundland and Labrador, Statutory Review of *Personal Health Information Act***

The Canadian Medical Protective Association (“CMPA”) appreciates the opportunity to participate in the consultations undertaken by the Statutory Review Committee for the second mandated review of Newfoundland and Labrador’s *Personal Health Information Act* (PHIA).

The CMPA delivers efficient, high-quality physician-to-physician advice and assistance in medico-legal matters, including the provision of appropriate compensation to patients injured by negligent medical care. Our evidence-based products and services enhance the safety of medical care, reducing unnecessary harm and costs. As Canada’s largest physician organization and with the support of our over 108,000 physician members, the CMPA collaborates, advocates and effects positive change on important healthcare and medico-legal issues.

PHIA provides a helpful framework to assist physicians and other custodians in their efforts to ensure patient privacy and to facilitate appropriate access to patient information. The CMPA appreciates the opportunity to highlight some aspects of the *Act* that have been important to our physician members and that should be maintained. We also recommend an amendment related to mandatory disclosure for enforcement purposes, which will assist in modernizing the legislation.

The CMPA submissions recommend the following:

- Maintaining the current permission to use and disclose personal health information for risk management purposes;
- Maintaining the current threshold for reporting breaches to the Privacy Commissioner;
- Supporting the remedial focus in PHIA rather than adopting a more punitive one; and
- Replacing the mandatory requirement to disclose information to police or other enforcement entities with a permissive disclosure provision.

**Risk Management**

PHIA recognizes the importance of permitting the use and disclosure of personal health information for error and risk management purposes and to obtain legal advice. We strongly recommend the Committee maintain those provisions as currently written.

When a member physician has a question about end of life care or how to fulfill their duty to report a child in need of protection, they can count on CMPA for advice. The fact that physicians can benefit from the CMPA's risk management services contributes to a recognized higher quality of care.

It is therefore important for an effective healthcare system that privacy legislation does not prohibit physicians from contacting the CMPA for the purpose of obtaining legal or risk management advice. This is particularly necessary in the current environment where health care delivery is increasingly complex and where resources are constrained. Legislation that supports a physician's efforts to obtain medico-legal advice for error reduction and risk management purposes serves the public interest and all participants in the healthcare system.

PHIA appropriately supports these objectives by permitting custodians to use personal health information without consent "for the purpose of risk management or error management" (s. 34(d)) and to disclose it without consent "to a person who requires the personal health information to carry out an audit for, or provide legal services, error management services or risk management services to, the custodian" (s. 39(1)(g)). These provisions are also consistent with health-specific privacy legislation in many jurisdictions.<sup>1</sup>

### **Privacy Breach Reporting**

The CMPA recommends maintaining the current threshold for reporting privacy breaches to the Privacy Commissioner.

PHIA requires a report to the Privacy Commissioner upon the occurrence of a "material breach" as defined in the *Personal Health Information Regulations*. PHIA also requires breach notification to individuals where their personal health information is stolen, lost, disposed of inappropriately or accessed by unauthorized persons, unless there is a reasonable belief that the breach will not have an adverse impact on the provision of health care or the mental, physical, economic or social well-being of the individual.

The CMPA submits these provisions set the right balance for ensuring transparency with patients and appropriate oversight by the regulator. The breach reporting provisions recognize that there may be circumstances where notification to the Information and Privacy Commissioner will not serve any meaningful purpose, such as where the breach is unlikely to result in harm to the patient. An overly broad reporting obligation can result in an unnecessary administrative burden without a corresponding benefit.

### **Remedial Focus**

The CMPA recommends that PHIA continue to have a remedial approach to inadvertent privacy breaches and refrain from adopting a more punitive one, as seen in some other jurisdictions.

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<sup>1</sup> See e.g. Manitoba's *Personal Health Information Act*, ss. 21(1)(e), 22(2)(e)(iv); Ontario's *Personal Health Information Protection Act*, s. 37(1)(d); New Brunswick's *Personal Health Information Privacy and Access Act*, ss. 34(1)(f), 38(1)(g); Nova Scotia's *Personal Health Information Act*, ss. 35(1)(j), 38(1)(t); Prince Edward Island's *Health Information Act*, ss. 22(5)(f), 23(13)(g); Northwest Territories' *Health Information Act*, ss. 35(d)(vi), 53(b).

It is significant that PHIA adopts a primarily educational and remedial response for confirmed privacy breaches, as opposed to an overly punitive approach to deal with these situations. Some jurisdictions have sharply increased the fines and offences in their health-specific privacy legislation in recent years,<sup>2</sup> but it is unclear that this approach will improve statutory compliance, especially where the non-compliance was minor, in error, or done through inadvertence. An overly punitive approach can also be disproportionate to the circumstances of the breach in many cases.

Further, an overly punitive approach can create a “chilling effect” on healthcare providers, who may, for example, be reluctant to adopt new technologies for fear of severe penalties. It also undermines any potential educational or collaborative approach to the remediation of privacy breaches, where the focus would be better placed on preventing similar occurrences in the future.

A remedial focus promotes and facilitates the appropriate use of technologies for an improved healthcare system, and provides custodians the opportunity to rectify errors and improve their privacy practices without fear of harsh punishment. At the same time, intentional acts that create harm for patients require action on the part of the regulator, which is currently addressed by PHIA. As such, we recommend that the penalties and offences under PHIA be maintained in their current form.

### **Mandatory Disclosure to Police**

We recommend that section 42(1) be amended to make it discretionary, rather than mandatory, to disclose personal health information in the context of inspections, investigations or similar enforcement procedures.

As written, section 42 could broadly require physicians to disclose patient information to the police without a warrant, subpoena or court order. We strongly recommend that PHIA be amended to make these disclosures discretionary, as it is in most other jurisdictions.<sup>3</sup> Such a change would also better respect physicians’ duty of confidentiality to their patients.

We trust these comments will be of assistance to the Committee in its review of PHIA.

Yours sincerely,



Lisa Calder, MD, MSc, FRCPC  
Chief Executive Officer

LAC/ml

cc. Dr. J.H. Brossard

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<sup>2</sup> E.g. Ontario’s *Personal Health Information Protection Act*; Saskatchewan’s *Health Information Protection Act*; Quebec’s *An Act respecting the protection of personal information in the private sector*.

<sup>3</sup> See e.g. British Columbia’s *Personal Information Protection Act*, Alberta’s *Health Information Act*, Saskatchewan’s *Health Information Protection Act*, Manitoba’s *Personal Health Information Act*, Ontario’s *Personal Health Information Protection Act*, New Brunswick’s *Personal Health Information Privacy and Access Act*, Nova Scotia’s *Personal Health Information Act*, Northwest Territories’ *Health Information Act*.