

Ontario Medical Association Submission

Administrative Monetary Penalties Regulation under
the Personal Health Information Protection Act, 2004

July 25, 2023



The Ontario Medical Association (OMA) welcomes the opportunity to comment on the proposed regulatory amendment under the *Personal Health Information Protection Act* (PHIPA) on administrative monetary penalties.

The OMA understands this regulation is being proposed in response to the new administrative monetary penalty regime the government introduced in March 2020. Given this is the first time administrative penalties are being introduced in Canadian health privacy legislation, the OMA cautions the need to be mindful of any unintended consequences and impacts the new mechanism may have on providers. While the proposed regulation sets out a number of criteria the Information and Privacy Commissioner (IPC) should consider when determining the amount of an administrative penalty under section 35(3), the OMA recommends the IPC also consider the degree of intention in the contravention. In other words, whether the contravention was intentional/wilful or unintentional/accidental should have a necessary impact on the assessment of a penalty. It is understood that the purpose of the administrative penalties is that they are applicable regardless of whether the contravention is wilful or not – i.e. unlike offences which only apply to wilful or known contraventions of PHIPA. However, gaps in provider knowledge or understanding of PHIPA requirements (or that of their agents and service providers) may contribute to accidental breaches, and in these situations, the more appropriate recourse would be provider education and training – not the imposition of administrative monetary penalties which can add to provider burden. While administrative monetary penalties are being introduced as a mechanism to *encourage* compliance, the system needs to provide education/training to providers to *enable* compliance.

This is especially important as a lack of clarity and misconceptions around what is permitted under PHIPA and the subsequent fear of committing a privacy breach has often led to risk-averse behaviours from physicians, hospitals and other institutions, which in turn, can impact patient care. The introduction of administrative monetary penalties has the potential to further contribute to this risk-averse approach. Many physicians' practices are small businesses focused on providing healthcare to their patients. The impact of administrative monetary penalties, without additional supports, will substantially increase the regulatory burden of this policy; a penalty up to \$500,000 can have a devastating impact on a physician's medical professional corporation compared to a hospital. As such, more emphasis needs to be placed on education and training rather than the new regime, so that instances of contraventions of PHIPA can be curbed before a contravention has occurred. Standardization of guidance with respect to obligations under PHIPA should be a priority. This can include additional education and guidance from the IPC on what is permissible under PHIPA in order to dispel misconceptions and curb risk-averse behaviour that might impact patient care. In developing and disseminating this information, it is important to identify how providers and institutions may best access this information and reach them through appropriate channels. For example, the OMA has developed several resources for physicians, including toolkits on understanding medical records rights and privacy breach reporting requirements, which should be promoted and pointed to by the Ministry and IPC in their respective guidance.

Further, physicians should not be required to complete multiple, inconsistent training programs at each location where they practice. This creates duplication of effort, increases administrative burden, and results in confused messaging for physicians. Instead, training should be standardized province-wide. All health sector stakeholders should use the same program that is sustained and updated regularly to respond to emerging technology, compliance and risk considerations. The OMA recently supported OntarioMD to develop a training program for this purpose, as part of a pilot program with Regional Security Operating Centers. The program contains engaging content that is equally applicable to community and institution (hospital)-based clinicians. It can be accessed from anywhere (web hosted) and already possesses the ability to audit and report on completion. This is the sort of structure that clinicians have repeatedly requested.

With respect to the other criteria for consideration by the IPC stated under section 35(3) of the proposed regulation, the OMA:

- recommends that under para. 2, the extent to which a person “took steps” should be considered, and the clause should be amended to state, “The extent to which the person took steps or could have taken steps to prevent the contraventions.”
- emphasizes the need to consider the penalty amount proportionate to the number of individuals and others affected by the contravention as stated under para. 5.

Once again, the OMA appreciates the opportunity to provide feedback.