



**Australian
Privacy
Foundation**

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April 20 2009

The Secretary
Senate Community Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

cc. Senator Joe Ludwig, Minister for Human Services
Senator Nicola Roxon, Minister for Health and Ageing

Re: Enquiry into Compliance Audits on Medicare Benefits

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

The APF is broadly supportive of measures to ensure that taxpayer funds are spent appropriately. However, we have serious concerns about a number of aspects of these particular proposals.

We have made two previous submissions on this matter, to Medicare Australia and the Department of Health and Ageing. Copies are attached to this submission. Our concerns are heightened by the fact that the points we have previously made to the agencies do **not** appear to have been reflected in the proposal. We note that we have had several meetings with Medicare officials and officials from the Department of Health and Ageing. The meetings, which commenced on December 12 2008, concerned the agencies' responses to APF submissions with regard to Information Sheets Number 1 and 2, which provide updates on progress in implementing the "Increased MBS Compliance Audits" initiative.

We remain very concerned about the following:

1. Medicare officials have indicated to us that they will instruct health practitioners not to provide detailed clinical information for audit. But the draft legislation does not reflect these Medicare undertakings with regard to the provision of clinical information for audit purposes.

We ask the parliamentary committee to ensure patient consent is necessary for access to any clinical detail unless the authorities possess reasonable grounds for believing that fraud has been committed'

2. We note the draft legislation refers matters relating to the clinical relevance of Medicare services to Professional Services Review for peer review. The exposure draft states: "Assessments relating to the clinical relevance of a service or whether that service was conducted in a clinically appropriate manner can only be made by other medical (or where relevant health) practitioners" (S 1.28, Explanatory Material). Research shows that when patients are not comfortable about the security of their sensitive health information they do not always

seek medical attention or withhold information [1]. Also, health professionals do not always ask relevant questions in similar contexts (2.)

The APF asks the committee to require that health information is reviewed by qualified health practitioners or by auditors that are qualified health practitioners

3. Although Minister Ludwig has guaranteed the destruction of patient health records after a practitioner has been audited, no mention has been made of how audit information will be stored or secured or who will have access to it during the audit process (although we have been informed as to who **will not** have access to it) [3]. The APF presumes an electronic process will be used and so is concerned about information security. The magnitude of information breach is exacerbated by connection to the Internet.

We request assurances that:

- All audit data will **not** be stored in a single database
- Neither will the data be connected to the Internet since a simple Intranet is preferable
- Alternatively, we favour a more secure transmission system, such as Fedlink (<http://www.finance.gov.au/e-government/infrastructure/fedlink/what-is-fedlink.html>), for communication across the Internet
- Robust access control and network security policies will be implemented
- Audit data will be routinely encrypted on local computers.

4. Section 1.25 (Explanatory Material) indicates that “A compliance audit is conducted by specially trained administrative staff “. Research suggests that many staff tend not to be adequately trained to handle secure information (2, 4). Staff have also been shown to avoid security measures if they will interfere with productivity (4,5).

We requests access to a summary of the “special” training documentation and procedures for “administrative staff” for APF review.

5. The APF notes that the Privacy Impact Assessment (PIA) Report used to analyse the audit procedure outlined in the draft Bill appears not to have been published. It is inappropriate for information like this to be suppressed (and, indeed, it is inconsistent with the Government’s stated policy). Explanatory documents supporting the bill refer to the PIA but do not provide access to details (S 1.70).

The APF requests public access to the PIA applied to the increased MBF audits process in order to address patient concerns and aid public debate.

6. During meetings with the APF, Medicare officials claimed that the draft bill simply clarifies existing powers rather than extends them. That is not true since the Bill has been expanded to allied health, nursing and other health professionals. Furthermore, the draft bill provides Medicare Australia with a general power to require practitioners to provide verifying documents during a compliance audit which has not been the case previously (S 1.39. Explanatory Material).

The APF is concerned about the misrepresentations by Medicare staff to the APF, and hence to the Australian public generally. This hampers public debate and casts the rationale provided for the entire bill into doubt.

7. The health sub committee of the APF recently conducted a straw poll of medical practitioners. Findings from the poll suggest that while government authorities may believe the time cost of increased audit compliance is reasonable, many Victorian medical practitioners do not agree (page 4, Explanatory Material). This is especially the case for female, bulk billing, medical practitioners with family responsibilities.

Evidently, the Medicare Benefits Schedule currently does not allow adequate time to meet patient needs with regard to long consultations. At their own expense and because of commitment to patient care outcomes, these practitioners cannot claim a refund for the actual

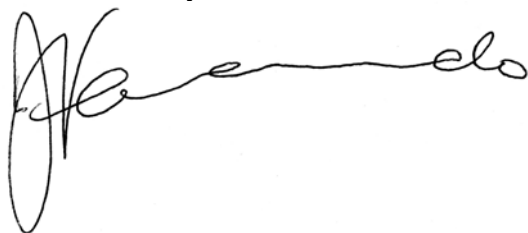
time they spend with patients as required for quality care. Thus, at a time of medical practitioner shortages, several of those that the APF surveyed claim the expanded audit process, and the resulting impact on the cost of service provision, is unacceptable. The increased audit process may push several clinicians out of medical practice completely. As one speaking for many said: "Its [medical practice] just not worth it any more."

The APF believes the time cost to health practitioners that is linked to the draft bill is of concern with regard to the affect on patient care outcomes and patient access to a suitable number of qualified clinicians.

Finally, the APF is happy to answer questions or clarify any point made in this submission. Increased Medicare compliance audits should address patient concerns, not dismiss them with claims of the "public good". The Foundation asks health authorities to stop hoping for grand solutions that breach patient privacy, and instead to focus on practical approaches to patient care, recognising that treatment is and always will be highly dispersed, and that the data is highly sensitive.

Thank you for your consideration.

Yours sincerely



Chair, Health Sub Committee
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References

- 1 Malcolm, H. (2005) Does privacy matter? Former patients discuss their perceptions of privacy in shared hospital rooms. Nursing Ethics 12:2 pp.155-166
- 2 Fernando, J. & Dawson, L. (2008) Clinician assessments of workplace security training- an informatics perspective. eJHI 3:1 p.e7
- 3 Viellaris, R. (2009) Patient files targeted in Medicare fraud fight. April 16.
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- 4 Post, G. V. & Kagan, A.t (2007) Evaluating information security tradeoffs: Restricting access can interfere with user tasks. Computers & Security 26:3 pp. 229-237
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- 9 Sullivan Nicolaides leak exposes hypocrisy. Courier-Mail March 30, 2009 11:00pm (cited April 5 2009) Available: <http://www.news.com.au/couriermail/story/0,23739,25265407-13360,00.html>).

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF's Board comprises professionals who bring to their work deep experience in privacy, information technology and the law.

The following pages provide access to information about the APF:

- papers and submissions <http://www.privacy.org.au/Papers/>
- resources <http://www.privacy.org.au/Resources/>
- media <http://www.privacy.org.au/Media/>
- Board-members <http://www.privacy.org.au/About/Contacts.html>

The following pages outline several campaigns:

- the Australia Card (1985-87)
<http://www.privacy.org.au/About/Formation.html>
- the Medicare Smart Card (2004-06)
http://www.privacy.org.au/Campaigns/ID_cards/MedicareSmartcard.html
- the Human Services Card (2005-06)
http://www.privacy.org.au/Campaigns/ID_cards/HSCard.html
- the Australia Card Mark II (2005-06)
http://www.privacy.org.au/Campaigns/ID_cards/NatIDScheme.html
- the 'Access Card' (2006-07)
http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html



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Rose Ross
Director (a/g) Medicare Integrity Section
Medicare Benefits Branch
Department of Health and Ageing
GPO Box 9848
Canberra ACT 2601

26 November 2008

Dear Ms. Ross,

Re: Stakeholder feedback about the "Increased MBS Compliance Audits" information sheet

I am writing in my capacity as Chair of the Health Sub Committee of the Australian Privacy Foundation (APF) and refer to our letter to Senator Hockey of September 17, 2008, where the APF advised it was pleased to establish effective dialogue with the Medicare staff and the Department of Health and Ageing on pertinent matters.

We also note Mr. Peter Halladay's request of November 14 2008, for feedback as to the information sheet "Increased MBS Compliance Audits". The Foundation is generally supportive of departmental moves to require practitioners to verify their claims for Medicare eligible services as a reasonable and responsible way of ensuring that taxpayer funds are spent appropriately. Yet we remain concerned about the potential for privacy breaches.

We are especially concerned about the following changes:

Access to evidence

Medicare's engagement in protracted negotiations with medical defence unions, industry bodies and legal firms, along with related administrative workloads do not

justify privacy breaches across the health sector. We support the idea of establishing legislative frameworks ratifying practitioner rights and obligations. However, organisational ease of audit does not justify threatening patient rights as to the privacy of their sensitive health information. The paper is quite general when it comes to the types of information it will require for audit. Also, one does not need unfettered access to patient data in order to breach their privacy- a label can be enough (e.g. Item 16590 might be a very shameful service to receive if one is a single Greek girl aged 15 years). In the end, for patients it is all about context, and when their identified or identifiable health records can be made available to a public authority for audit purposes, then that authority has betrayed public trust.

The paper also talks about appropriate safeguards for the collection and use of health information. Several information breaches, due to human error, have been recently reported in the press. What are the appropriate safeguards for human error? As time goes by, the scope for human error changes as technologies do. Medicare cannot guarantee the security of patient information. Therefore, restrictions confining access to times of reasonable suspicions of illegal behaviours after all other options have been properly considered, as well as the imposition of biting sanctions to dissuade abuses, as the recent ALRC report indicates, must be part of the audit system [*ALRC Report 108: For Your Information: Australian Privacy Law and Practice* 2008. http://www.austlii.edu.au/au/other/alrc/publications/reports/108/_3.html].

Finally, after discussing new training requirements and a legislative framework within which to ask for access to patient records, the “Increased MBS Compliance” information sheet claims this is not more red-tape for providers. Yet the *Medical Observer* has recently printed a series of two articles entitled “Medicare crackdown: Your survival guide” [Hoffman, L. Oct 31 & Nov 7 2008 <http://www.medicalobserver.com.au/medical-observer/Default.aspx>] to support clinicians through the change despite their concerns about resulting quality of patient care outcomes [Bracey, A. “Tougher penalties flagged for Medicare offenders” Nov 21, 2008 <http://www.medicalobserver.com.au/medical-observer/Default.aspx>]. The article refers to a requirement for doctors to store defensive patient records to support all Medicare claims. The audit process extends Medicare’s powers to review documentation from broader range of clinicians’ than at present. Logically then, the new audit process amounts to more red tape.

Furthermore, who will provide privacy and security training and to what benchmark? Australian health services and authorities have a very poor record when it comes to training individuals about privacy and security safeguards (see, for instance, Fernando & Dawson (2008) Clinician assessments of workplace security training- an informatics perspective, *electronic Journal of Health Informatics* (eJHI), 3(1) 27). The proposed penalties section does nothing to alleviate these concerns. Also, the discussion paper refers to Commonwealth legislation, which contradicts several other jurisdictions (ALRC op.cit.). Hence, the APF requires more specific detail for the argument presented in the Medicare paper in order to be convinced of governmental strategies to protect privacy and patient-doctor confidentiality.

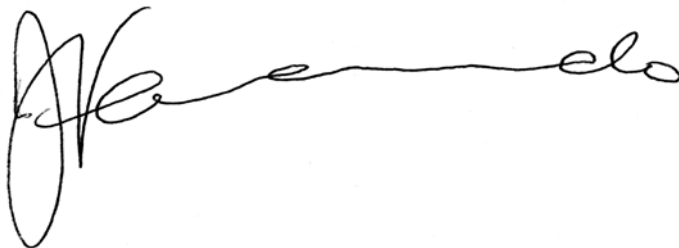
Legislative changes required

A PIA must precede any legislative changes to the Health Insurance Act 1973.

Consultation

The APF is a key stakeholder in the outcome of this proposal. We support revised ways of ensuring that taxpayer funds are spent appropriately, reasonably and responsibly. However, from a privacy and security perspective, the process outlined in the paper is intrinsically flawed. Consequently, we would be pleased to participate in ongoing consultation processes until a Medicare Audits Bill is satisfactorily introduced to Parliament.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Juanita Fernando', with a large, stylized initial 'J'.

Juanita Fernando

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11 March 2009

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Director
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Medicare Benefits Branch
Department of Health and Ageing
GPO Box 9848
Canberra ACT 2601

Dear Ms. Ross,

Re: APF feedback on "Information Sheet No. 2. The
Increased MBS Compliance Audit Initiative"

I am writing in my capacity as Chair of the Health Sub Committee of the Australian Privacy Foundation (APF) and refer to our earlier correspondence late last year with regard to the "Increased MBS Compliance Audits" information sheet and our subsequent meeting on December 12, where the APF advised it was pleased to establish effective dialogue with Medicare staff and the Department of Health and Ageing on pertinent matters.

1. Privacy Impact Assessments (PIAs)

As you no doubt remember, the Foundation is generally supportive of departmental moves to require practitioners to verify their claims for Medicare eligible services as a reasonable and responsible way of ensuring that taxpayer funds are spent appropriately. Yet we remain concerned about the potential for privacy breaches. During our meeting in December, we discussed the idea of an APF review of Medicare PIA methods as a means of improving the process, as required. Has there been an outcome from that meeting? A PIA must precede any legislative change to the Health Insurance Act 1973.

2. Audit requirements breach privacy rights

We are especially concerned about the focus of this proposed change in legislation. Considerable coverage is given to the mechanism of auditing service providers, e.g. why a particular test has been done, referral requests, time required to provide a service, if a pre-existing condition existed. Health and medical service providers will be subjected to considerable government scrutiny. The type of information the service provider needs to produce can and does violate patient privacy rights. This includes but is not limited to their name, Medicare number and attendance record.

3. Perverse incentives

The Information Sheet outlines a range of what the Medical Observer calls 'perverse incentives' (Bracey 2009). The incentives refer to substantial fines over and above amounts of \$2,500 to be repaid to Medibank and suggest that many doctors will pay the fine simply to satisfy the new requirements. On the one hand, the Information Sheet on proposed changes claims they are designed to have minimal impact on a provider's time and business and that practitioners will not be required to introduce new types of record to satisfy MBS compliance audits. On the other hand, various e-learning products and a range of other resources are available to help providers better understand the new Medicare requirements. These ideas are mutually exclusive. Also, anecdotal evidence suggests the majority of doctors do not know how to use a computer and bandwidth issues also limit access by rural and remote providers (Reed 2008). Therefore, the audit process will have a significant impact on a provider's time and business.

4. Biting Sanctions

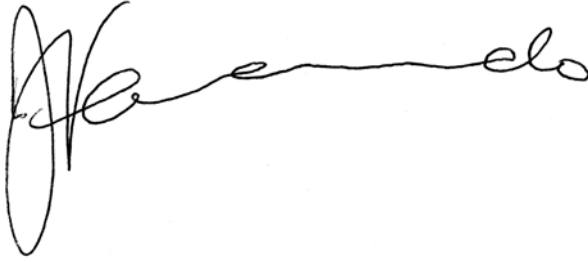
The APF written submission of November 2008 asks Medicare to confine access to patient information to times of reasonable suspicion of illegal behaviour, after all other options have been considered, and to impose biting sanctions to dissuade abuse as a recent ALRC report indicates (ALRC 2008). However, the Information Sheet points out the documents provided as evidence for an MBS audit will be able to be used in criminal matters. It will be very distressing to learn that one's medical prescription or treatment is plastered all over the news media when one has no idea the data had been used as evidence for audit purposes at all. What protections have been developed to secure patient rights to the privacy of their sensitive health information in terms of misuse or in the case of criminal matters?

5. Evidence

While the Information Sheet allows providers to determine what might be useful in respect of responding to a concern by Medicare Australia, patients are not accorded the right to be advised of when, what, how and why access to their sensitive health information is required. The decision protects the privacy of practitioners from patients to the latter's detriment. This decision deflects attention for information breach away from its implementers and instead pits the patient's right to health privacy against the provider's right to privacy. Privacy legislation applies to people not businesses. The APF maintains an adversarial relationship between patients and their clinicians supports the notion that citizens are less important than the government and its processes. A constructive way forward might be to ask patients for consent to provide their protected health records to Medibank as evidence before doing so and to advise patients that the practice being audited and ***not*** the individual.

In short, from a privacy and security perspective, the process remains intrinsically flawed. The APF, staffed by all volunteers, is a key stakeholder in legislative amendments to the Health Insurance Act 1973. Yet the Information Sheet shows no evidence of taking ***any*** of our feedback into account. Consequently, we would be pleased to participate in an ongoing and ***meaningful*** consultation process to ensure that proper legal frameworks have been established.

Please do not hesitate to ask questions or for clarification of any point made herein.
Yours sincerely

A handwritten signature in black ink, appearing to read 'Juanita Fernando'. The signature is fluid and cursive, with a large initial 'J' and 'F'.

Juanita Fernando
Chair
Health Sub Committee
<http://www.privacy.org.au/>

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