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Privacy Commissioner of Australia
GPO Box 5218
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Cc: Attorney-General's Department, Information Law Branch

Your reference: 2005-0042-03

30 August 2006

RE: PRIVACY LEGISLATION AMENDMENT BILL

Thank you for your letter dated 23 August

We are grateful for the consideration you have given to our submission. We remain concerned about the overall effect of the amendments in significantly weakening the privacy protection afforded to sensitive health information.

I note that the position you have taken was foreshadowed in your 2005 report of the Review of the Privacy Act – we had overlooked that in light of the more recent discussion of the issue in your January 2006 Temporary Public Interest Determinations (TPIDs). However, review of the relevant sections of the report now does not allay our concerns.

Much of your response to our concerns is based on the remaining safeguard provided by NPP10.2(a) that 'the information must be necessary to provide a health service to the individual'.

We were aware that this condition remained. The fact that we did not expressly acknowledge this in our submission may have distracted you from the main focus of our concern.

This is not that the changes will allow collection of health information for blatantly non-health-related purposes – we did not envisage that any such collection would be likely to be 'authorised or required by or under and any law or in accordance with rules …etc'. The changes will however change the basis on which health information can be collected *for the provision of health services* by a potentially unlimited range of private sector organisations.

Our concern is partly with the breadth of purposes that might be encompassed within the concept of 'providing a health service' once that is left entirely to other interests and mechanisms to decide.

The other element in our concern relates to the process by which the second 'authority' test will be able to be satisfied in future.

Previously the test of the collection being 'required by law' would have given a specific opportunity for consideration of privacy implications in the legislative process. It is relatively easy to identify a specific clause in legislation 'requiring' the collection of personal information.

The amendments currently in Parliament not only remove the need for an explicit balancing of privacy and other interests by the Privacy Commissioner, through the Public Interest Determination (PID) process under the Privacy Act. They also effectively reduce the threshold of justification by allowing for collection '*authorised* by or under law' which can encompass a wide range of 'incidental' authorities. It will be much more difficult, if not impossible, to identify in advance legislative provisions or other 'authorities' which may later be relied on as the basis for collection of sensitive health information without consent.

We suggest that the Prescription Shopping Information Service is already a good example of 'function creep'. The implied meaning of the first test in NPP 10.2 is that the information will be of assistance to the individual. To argue that the operation of the PSIS is 'necessary to provide a health service to the individual' is to severely twist its meaning. It is only 'necessary' because of the government's policy of deterrence – the objectives of which may be partly health related but are also clearly driven by cost considerations. The results of the use of the PSIS may or may not be 'of assistance to the individual' and in any case this is a subjective judgement. We suggest that it is already arguable that the use of the PSIS might not in all cases meet the definition of health service in the Privacy Act. The Determinations, and the amendments currently proposed, appear to simply assume that it does.

It may well be the case that *in relation to the PSIS*, other policy objectives should outweigh the privacy of individuals – the Commissioner made this judgement in the Determinations and we did not object in principle. However the proposed amendments remove the need for a case by case independent consideration of the balance. Any collection of health information which is judged *by the organisations involved* to be 'necessary to provide a health service …' and 'authorised …' in accordance with NPP 10.2(b) will be allowed without the consent of the individuals concerned.

Conclusion

It remains our contention that the amendments currently in Parliament significantly weaken the privacy protection afforded to Australian's sensitive health information. We can understand the Commissioner's reluctance to continue to have to make successive PIDs in this area, and we do not disagree that a legislative solution is better, but the proposed amendments are too broad.

Preferable Approach

We believe that a preferable approach, that correctly balances privacy and other interests, is to leave NPP10.2 unchanged, and instead to legislate a *requirement* for the relevant 'approved suppliers'[1] to collect information, where appropriate, from the PSIS. This would put the PSIS on a proper legislative footing and also give the opportunity for conditions and other safeguards such as regular reporting, auditing etc.

We consider it important to bear in mind that prescription information can be highly sensitive and that the PSIS can potentially be used not just by the 11,000+ registered medical practitioner prescribers but also by unquantified numbers of pharmacists in a wide range of health care and welfare professions and organisations.

In light of the recent publicity surrounding unauthorised privacy intrusions by hundreds of Centrelink staff, it would seem reckless to legislate for access to PSIS by thousands[2] of 'approved suppliers' without imposing additional accountability measures.

We will be drawing our continued concerns to the attention of Senators.

Yours sincerely

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[1] Thank you for directing us to the extract from the Medicare Direction, clarifying the categories of 'approved supplier', annexed to the TPID on your website – we note again that the Annex is missing from the TPID Explanatory Statement (which appears only on COMLAW?) and you may wish to correct this.

[2] In relation to figures on the use of the PSIS, you state that "The Office understands that these figures are now publicly available from Medicare Australia." We cannot find any such information on their website – only very general information about PSIS. We have now requested the information from the Medicare Australia Privacy Manager.