Australian Government

Department of Human Services

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By email

Dear Dr Kendall

Human Services Legislation Amendment Bill 2010

Thank you for your letter of 8 March 2011 seeking clarification to a number of issues in relation to the Human Services Legislation Amendment Bill 2010 (the Bill). I am pleased to provide the following response.

Schedule 1, items 74 and 76

These items amend section 8ZN of the *Medicare Australia Act 1973*, which is in Part IID of that Act. Part IID confers powers on the Chief Executive Officer of Medicare Australia to investigate non-compliance with certain provisions specified in the *Medicare Australia Act 1973* and the *Health Insurance Act 1973*. These powers support Medicare Australia's compliance functions in relation to Medicare, Pharmaceutical Benefits Scheme and other health programs delivered by Medicare Australia.

In the course of Medicare Australia exercising its powers to investigate non-compliance under section 8ZN of the *Medicare Australia Act 1973* (the Medicare Act), Medicare Australia may seize or copy hard drives containing electronically recorded clinical data. The hard drive may potentially contain a large number of patient records, however, only a small number of those patient records may be relevant to the investigation because it relates to particular services rendered to particular patients on specific dates. The proposed amendments to section 8ZN seek to address anomalies which arise when a computer hard drive is seized or copied under warrant and seek to produce a sensible outcome which will ensure that patients continue to be notified when their clinical details have been scrutinised by Commonwealth officers.

The amendments will put a stop to the unnecessary worry for patients and the high cost associated with large scale notifications to patients whose clinical details were never actually scrutinised. While there has been some concern expressed that the proposed amendments may impact on the privacy of individuals, every patient whose clinical details are actually scrutinised will still be notified.

The phrase "clinical details" broadly covers information in a particular patient's records about that patient's health, but not other patient details. This includes information about any medical condition reported by the patient or diagnosed by the practitioner, and any treatment recommended or prescribed by the practitioner. So, for example, a date of consultation would not be a clinical detail, but a record of the diagnosis at that consultation would be.

Medicare Australia already collects and maintains claiming data against Medicare Benefits Schedule (MBS) item numbers which by their nature reveal clinical details about the patients in relation to whom the items are claimed. These item numbers are provided by or on behalf of the patient, as part of the claim. For example, certain item numbers may only be claimed for patients who have pre-existing conditions, such as diabetes. Where item numbers or item descriptors are the only information seized and examined under the relevant provisions, the notification provision would not be triggered because no additional knowledge of clinical details would be obtained by the Department of Human Services through the seizure and examination. This situation would typically occur when billing records, rather than clinical records, are seized and examined.

As amended, Part IID of the renamed *Human Services (Medicare) Act 1973* will contain a number of safeguards to patient privacy in circumstances where multiple patient records are held together in electronic form. These provisions (sections 8ZF, 8ZG, 8ZGA and 8ZM) in short require that data not used in evidence be destroyed or returned to the person from whom it was seized.

The type of investigation will determine whether a patient's clinical details need to be examined. For example, where an investigation centres on fraudulent claiming by a doctor for a specific MBS item, the records of patients who received that particular MBS item from the doctor may need to be examined for evidential purposes. The case for investigation must be strong enough for a magistrate to approve a warrant to enable Medicare Australia to seize records.

Currently, safeguards exist to protect patient's privacy when exercising search and seizure powers and these will continue after the integration of the Human Services portfolio. If the Bill is passed, the powers and functions under Part IID will be exercised by officers of the Department of Human Services (DHS), rather than Medicare Australia, and the existing controls outlined below will be continued by DHS.

The examination of patient records containing clinical details is undertaken by appropriately trained and qualified Medical Advisers employed by the portfolio or, where necessary, by Compliance Officers who are overseen by the Medical Advisers.

Officers are also subject to the secrecy provisions set out in the *Health Insurance Act 1973* and the *National Health Act 1953* which set penalties for the unauthorised disclosure of information, including fines and imprisonment. In addition, the portfolio is subject to the requirements of the *Privacy Act 1988* which restricts and regulates the collection, use and disclosure of personal information.

When patient records are seized, DHS will review the outcome of the seizure and examination, and determine which patients require notification. The review process, which involves both Medical Advisers and Compliance Officers, will operate on the basis of a prima facie assumption that clinical knowledge has been obtained following each seizure and examination. The relevant Medical Adviser or Compliance Officer will need to demonstrate that the notification requirement should not be triggered and a Senior

Executive Officer will be responsible for approving every instance of seizure and examination without notification.

Whether knowledge of a patient's clinical details is actually obtained in a particular seizure and examination will be a question of fact. It would be a breach of section 8ZN if particular patients were not notified when required and this could ultimately be determined by a court, if the question arose in legal proceedings.

The Office of the Australian Information Commissioner (OAIC) has been briefed on the existing investigation process and the intended operation of the amended provisions. The OAIC submission to the Committee notes that the provisions appropriately balance privacy protection and the efficient and effective conduct of relevant investigations.

The retrospective effect of Schedule 5, item 1

One of the key goals of the integration is that it will be seamless for customers and stakeholders to access services delivered by the Human Services portfolio. While every effort was made in preparing the transitional provisions to ensure they would operate correctly, it is possible that the transitional provisions will not adequately cover every circumstance. Accordingly, it is considered prudent to have the ability to make regulations in relation to transitional matters.

As a practical matter, the need for transitional regulations may become apparent after a transitional issue is identified. Given the seriousness of any legislation with retrospective effect, two safeguards have been built into item 1 of Schedule 5, as follows:

1. Regulations will only have retrospective effect if they are made within six months of the Act commencing. Most transitional issues are likely to occur in the first six months after the integration takes effect, when large numbers of employees and assets are transferred, many instruments are affected by transitional provisions, and a number of reports are required. Accordingly, limiting the retrospective operation of the regulation making power in this way is considered to be an appropriate safeguard.

2. Regulations made under item 1 of Schedule 5 may only relate to transitional matters arising out of amendments made by the Act. In practice, this means that the scope of the regulations is limited to internal administration. The regulations cannot affect any other Act, such as program legislation and it will have no effect on individuals' health and welfare entitlements.

Operational impact of policy changes

Careful planning and management of Service Delivery Reform is necessary to ensure that the operational impact of the changes do not have unintended consequences or negative impacts on customers or staff. Work is currently underway in the Human Services portfolio to map out the future phases of the reform, including integrating back office functions to free-up staff for more customer-facing roles.

A key feature of Service Delivery Reform is putting people first in the design and delivery of services. To do this, the Human Services portfolio has adopted a co-design approach to understanding our customers and working with them, as well as our staff, to design, shape and deliver better services for the community. In 2010, forums were held with people who use government services, including community, staff and stakeholder groups. The co-design approach that is being developed will ensure that we design services, in conjunction with the community, that are more efficient, effective and 'customer-ready'.

Human Services staff have had the opportunity to be involved in consultation and two-way communication in regard to Service Delivery Reform. Change management plans are in development to ensure staff are well equipped to transition through the change and provided with opportunities to engage in well designed and rewarding roles. Where roles change, we will consult with staff well in advance and support them with a structured change process, tools and training where appropriate.

Importantly, the reform program is being structured in a way so that essential services and business as usual activities will not be disrupted. The staged approach being taken allows for close monitoring and assessment, and consideration of customer and community needs throughout the changes.

Appropriate placement of new employees

The portfolio is working closely with the Australian Public Service Commission (APSC) and the Community and Public Sector Union (CPSU) to prepare for the portfolio Enterprise Agreement (EA) to support the integrated Department from 1 July 2011.

The portfolio EA will replace the existing Agreements for DHS (including the Child Support Agency), Medicare Australia and Centrelink.

The portfolio EA will provide for alignment of employment terms and conditions (including salary) for employees across the portfolio. We expect that this alignment will support Service Delivery Reform by providing more flexibility for the movement of work and employees within the portfolio.

The aim is to have the portfolio EA in place by 1 July 2011. The CPSU will be in a position to commence bargaining in early April. If the portfolio EA is not in place by 1 July 2011, the Human Services Legislation Amendment Bill 2010 contains transitional provisions that will continue the existing Medicare Australia and Centrelink collective agreements until the portfolio EA is in place.

The portfolio has exchanged correspondence with the CPSU to confirm the process of determining which agreement applies to employees recruited to the portfolio whilst the transitional provisions are in place:

New employees will be subject to a determination of which collective agreement is the most applicable to their new employment. This determination will be made by the Secretary of the Department of Human Services (or delegate).

- Where the work that a new employee is engaged to perform is clearly identifiable as belonging to one of the former Human Services agencies (for example, Customer Service Adviser for Centrelink), the Secretary/delegate will place the new employee on the agreement relating to that function (in this example the Centrelink Agreement).

- Where the employee is to perform duties in an enabling service that has been integrated (for example, HR, IT, Legal, Communications), the employee will be placed on the collective agreement of the former agency that had "the lead" for that service. For example, new HR employees would be placed on the Medicare CA, new Legal employees on the DHS CA.

Other issues

Altering name and sex details

The Human Services portfolio recognises that gender is an important part of a person's identity. Gender is a qualification requirement for some benefits that the Human Services portfolio administers.

- It is necessary for Centrelink to correctly maintain gender details to establish eligibility for some social security payments. Currently, a customer can request their name and title be changed to reflect their preferred gender but the record of the customer's gender cannot be changed unless the customer has undergone gender reassignment surgery.

- In line with the Department of Health and Ageing policy, Medicare benefits are payable for clinically relevant services as defined by the clinician providing the service and as set out in the MBS. The payment of some MBS item numbers is based on the patient's gender, for example certain urological and gynaecological items. Under Medicare Australia's current policy, the gender information on a person's Medicare enrolment file can be amended if they provide supporting evidence in relation to gender reassignment. If a person cannot provide supporting evidence, their gender cannot be amended, however they may be able to change their legal name on their Medicare record.

These Centrelink and Medicare Australia arrangements will not change as a result of the passage this Bill.

Service Delivery Reform will give all people, including transgender customers, the ability to update some of their personal details across the portfolio, if they choose to have their information linked through a 'tell us once' approach. This will enable customers to more easily change some personal information, such as a change of name, across the entire portfolio.

The Human Services portfolio is developing a new service charter which will reflect the new integrated portfolio. The charter will outline the department's approach to service delivery. The service commitments are being developed in consultation with the community, staff and stakeholders through a range of engagement activities.

Customers' accessing their details

As referred to above, the passage of this legislation will allow the portfolio to adopt a 'tell us once' approach for customers. This will make it easier to for customers to update their personal details once across the portfolio, should they chose to have their information shared.

The portfolio will make better use of technology and upgrade online services so customers who prefer to interact online will have more options to do so. The reform will simplify processes and give people more control and better support when they need it.

Evaluating and reporting on success

To monitor progress and ensure objectives are achieved, robust internal and external governance structures have been put in place. Independent external advisers have been providing further assurance and guidance. DHS will regularly report to Government on the progress of Service Delivery Reform and will include monitoring and tracking on how the

reform is performing against key outcomes. In addition, progress on the implementation of Service Delivery Reform will also be reported through the annual report, Portfolio Budget Statements and other public materials.

Thank you for the opportunity to provide the Committee with clarification on issues concerning the Human Services Legislation Amendment Bill 2010. The Human Services portfolio considers the passage of the Bill as key step towards more effective, efficient and improved service delivery for the Australian public.

Yours sincerely

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11 March 2011

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