From: Rebecca Coghlan [coghlans@q-net.net.au]
Sent: Wednesday, 10 May 2000 4:57 PM
To: laca.reps@aph.gov.au
Subject: Consumers and protection within legislation

The Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

To whom it may concern.

Re: The Privacy Amendment (Private Sector) Bill
My name is Rebecca Coghlan,

I am an active health consumer representative, and I run a business called Health Consumer Persepctives. I am a Board member of the Health Consumers' Council of WA.

I support the position of the Health Consumers' Council of WA in it's stance that the health provisions should be removed from this bill and put in health specific privacy legislation or an enforcable code.

Privacy protection in an electronic age is increasingly on the agenda. The European Union has taken the lead in developing an enhanced framework for the protection of privacy, now in place across most of Europe. This has included ensuring an adequate level of protection for consumers against privacy abuses in the private sector as well as in the public sector where awareness of these issues is relatively well established. The Australian Government has undergone a number of backflips in terms of its own intention to provide a similar level of protection for citizens of this country. The Privacy Amendment (Private Sector) Bill, has finally been tabled in the current session of the Commonwealth Parliament.
Ostensibly this Bill is intended to complement and extend the protection provided by the existing Privacy Act 1988 (Cth). This Act has for over a decade provided a means of monitoring and promoting privacy in the public sector and ensuring a means of redress for consumers in the event of privacy abuse by public sector agencies. As was demonstrated by a case in the Magistrate's Court this year, involving a Health Insurance Commission employee found regularly browsing the files of Asian women and consumers of IVF services, this level of supervision is vital. Interestingly the case also demonstrated some shortcomings of the existing Privacy Act. The employee was actually prosecuted for breach of privacy provisions in the National Health Act 1953 (Cth) rather than the Privacy Act itself. Breach of the Privacy Act may lead to compensation for an aggrieved consumer but does not generally give rise to criminal sanctions.
Unfortunately it appears that the new legislation proposed does nothing to upgrade the existing Privacy Act. Rather what is proposed by way of regulation for the private sector falls far short of even the limited privacy regime currently applicable in the public sector. At the time of writing, consumers and privacy advocates have not had access to the Bill itself, but only a description of 'Key Provisions'. The framework proposed is described by the Government as a 'light touch', co-regulatory approach to

privacy. Others have suggested it treats consumers as a 'soft touch' because the proposed regime is so ineffectual.

The first major problem is that what is envisaged is a series of industry codes developed and enforced by industry bodies, broadly supervised by the Privacy Commissioner. Secondly the default framework provided in the proposed legislation is full of holes in terms of what might actually constitute a privacy abuse. Thirdly the enforcement mechanisms are weak.

Let's take the example of a health consumer who seeks access to their personal health record maintained by a private medical specialist. The health 'industry' has proved itself notoriously resistant to allowing consumer access to their personal health information. The Access principle described in the Key Provisions does not advance the cause. It includes a list of at least 10 reasons the medical specialist might seek to hide behind in order to justify a refusal of access. These include for example, the possibility that providing access might be "likely to prejudice the prevention, detection, investigation, prosecution or punishment of (any) criminal offences or breaches of (any) law imposing a penalty or sanction" (National principle 6(j)(i)! This is dramatically weaker than health consumer rights of access to records kept in the public sector, provisions the Australian Law Reform Commission has recommended need to be strengthened.

The Privacy Commissioner has produced a Report on the Application of the National Principles for the Fair Handling of Personal Information to Personal Health Information (December, 1999). He has suggested that he will develop a set of guidelines to assist practitioners and complaints bodies in assessing consumer requests for access. He proposes that these advisory guidelines will set out a 'hierarchy' of access distinguishing between consumer access to so-called 'evaluative' material and factual information, for example. This is certainly consistent with what many in the health sector, eg the AMA, have been promoting for years. It is completely inconsistent with the general direction of reform in this area such as the ACT Health Records (Privacy and Access) Act 1997 and the views of consumer organisations or more progressive medical groups such as the Royal Australian College of General Practitioners.

The aggrieved consumer must then take their claim to a health 'industry' body for determination. It is difficult to see why consumers would have much confidence in the interest or ability of such a body to produce a result in their favour. In addition, if the complaints body does not find in the consumer's favour, the Key Provisions do not give the consumer any right of appeal from its decision. Further the Privacy Commissioner does not have a right of review even if he considers the matter raises issues of public interest. He does have the power to revoke industry codes, however one would expect that this would be a power exercised only as a last resort.

Consumer groups and privacy advocates are hoping that the process of lobbying to date and as the legislation passes through Parliament may result in some improvement of the Bill. However, at this stage many of us consider that as a Privacy Bill, the Bill is both completely misguided and a great disappointment. The inadequacy of the proposed legislation in regard to the interests of health consumers in particular, has led key health consumer organisations to urge that the health provisions be removed from the current Bill and dealt with entirely separately.

Yours sincerely,

Rebecca Coghlan

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