The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-014125

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

28 MAY 2021

Dear Senator Connie

I refer to your correspondence of 13 May 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) concerning the National Health (Data-matching) Principles 2021 (Principles).

The Committee has requested advice on the following:

- availability of independent merits review
- parliamentary oversight – technical standards are not legislative instruments.

My advice on these matters can be found in the attached.

I trust this information will be of assistance to the Committee.

Yours sincerely

Greg Hunt

Encl (1)

MC21-014125

National Health (Data matching) Principles 2020 [F2021L00006]

Response to Senate Standing Committee for the Scrutiny of Delegated Legislation

Background

Data matching powers, duties and functions under the *National Health Act 1953* (National Health Act) are delegated from the Chief Executive Medicare (CEM) to officers within the Department of Health. Although the role of the CEM sits within Services Australia (SA), none of the CEM's data matching powers are delegated to SA officers.

As an Australian Government agency, the Department of Health is subject to the Australian Privacy Principles (APPs) as prescribed by the *Privacy Act 1988* (Privacy Act). The Department's data matching program for permitted Medicare compliance purposes, as enabled by the National Health Act, is also subject to the APPs. The intent of the *National Health (Data-matching) Principles 2020* (Principles), which were drafted in consultation with the Office of the Australian Information Commissioner (OAIC), is to provide additional safeguards which are specific to data matching. This means that in practice, the data matching facilitated by the Department of Health for Medicare compliance purposes aligns with both the APPs and the Principles. It is important to note, the Department's Medicare compliance responsibilities relate to health providers only and not individual patients.

As part of this approach, the Principles reflect the APPs (with subsection 18(6) particularly based on APP 13). As APP 13 still applies to the Department of Health it is worth noting that steps to correct information may be undertaken concurrently in line with both APP 13 and subsection 18(6). For example, the Data Matching Notice published on the Department's website provides guidance to individuals about how to request an update to their personal information.

During the development of the data matching legislation, it was intended that the Privacy Act would continue to apply, including the privacy functions it grants to the Australian Information Commissioner (Information Commissioner). The Information Commissioner has the ability to conduct an assessment in relation to data matching.

The responses to the specific questions raised by the Committee are as follows:

Scope of administrative powers

The Committee has asked for advice as to:

- **whether decisions made by the Chief Executive Medicare under subsection 18(6) are subject to independent merits review; and if not, what characteristics of the decision justifies the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; and**
- **whether the Information Commissioner has a merits review function in this context.**

Decisions made by the CEM under subsection 18(6) of the Principles are not subject to independent merits review, as these are preliminary decisions. This is in accordance

with the Administrative Review Council's guidance document, 'What decisions should be subject to merits review?'.

The decision to take reasonable steps to correct or not correct personal information is not a 'discretionary decision with the capacity to affect rights, liberties, obligations or interests'. It is merely a precursor to potential substantive decisions.

Preliminary or procedural decisions

Preliminary or procedural decisions may include decisions that facilitate, or that lead to, the making of a substantive decision. In the Council's view, this type of decision is unsuitable for review.

This is because review of preliminary or procedural decisions may lead to the proper operation of the administrative decision-making process being unnecessarily frustrated or delayed. In the case of preliminary or procedural decisions, the beneficial effect of merits review is limited by the fact that such decisions do not generally have substantive consequences. The benefits are outweighed by the cost of potentially frustrating the making of substantive decisions.[1]

Any decisions made under subsection 18(6) are preliminary decisions rather than substantive decisions, as these decisions alone do not have the potential to adversely affect an individual.

There are no practical consequences to an individual as a result of the CEM's decision to correct or not correct information in a matched dataset. The nature of the information analysed via data matching informs the Department as to whether further compliance assessment is necessary.

Only further compliance decisions have the potential to affect rights, liberties, obligations or interests. All matched information which informs compliance assessment or action is further manually verified by Department officials as part of the compliance process.

Affected individuals such as health providers are afforded procedural fairness throughout the compliance process, and as such, have the ability to review and contest the accuracy of data either before any substantive decisions are made or as part of the opportunity for review of the substantive decision.

In practice, the compliance business model used by the Department of Health requires an identified risk to be considered and approved by governance bodies before a case is moved into compliance assessment and treatment. Data matching is one of many identification and analytics methods by which potential compliance concerns are identified. **Figure 1** demonstrates how potential non-compliance concerns are detected and assessed for possible compliance treatment.

All substantive decisions are undertaken by trained personnel during the compliance assessment and treatment process. The treatment of compliance cases involves procedural fairness and those subject to compliance action are offered the process to review or appeal decisions.

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[1] Administrative Review Council, *What decisions should be subject to merits review?* 1999, available at https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999 [para 4.3-4.4].

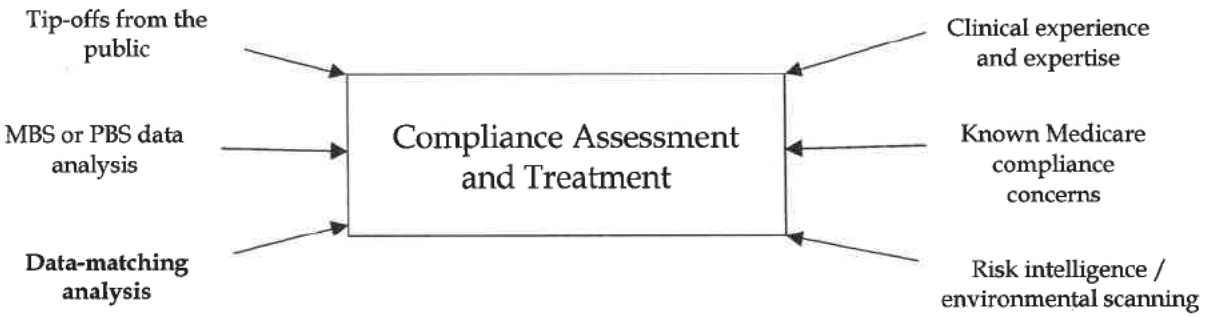

***Figure 1**: Data matching within the compliance process*

Data matching is a process undertaken for specific permitted purposes related to Medicare compliance. Matched information is a copy of original information made for data matching and to be analysed for compliance concerns. Destruction provisions in Part 5 of the Principles state that when the matched information is no longer required for the permitted purpose for which it was matched or the information will not be used to inform compliance processes, it must be destroyed.

It would not be appropriate to subject this preliminary decision to review as it will likely inform a later substantive decision, and there will be an opportunity to contest the use of any incorrect information in relation to that substantive decision.

Additional considerations

It would be inadvisable to correct an individual's information after matching has occurred. Correcting the information at this stage would likely:

- jeopardise the integrity of the future compliance process if the matched data is being kept to inform an investigation into fraud;
- lead to version control and data integrity issues;
- result in the potential inaccuracies arising again if the matched data (a copy) is corrected but the original source data is not.

The matched information represents a 'point in time' result which cannot be changed without affecting the results of the match.

Although the decision is preliminary, given that all data matching is for compliance purposes, having review rights apply at the appropriate stage in the compliance process minimises the risk of jeopardising 'investigation of possible breaches and subsequent enforcement of the law'.[2]

In addition, as matched information is necessarily transient and a copy, there would be limited benefits to an individual to seek review of a decision of the CEM made under subsection 18(6), when it would be more appropriate for the individual to request, under APP 13, for the original information to be updated. Enabling review of preliminary decisions would be of limited benefits to the individual and would inhibit the progress towards any substantive decisions to be made as part of the compliance process.

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[2] Administrative Review Council, *What decisions should be subject to merits review?* 1999, available at https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999 [para 4.31-4.32].

Australian Information Commissioner Review

As the APPs already apply to data matching, the Principles are intended to provide additional and complementary obligations. Subsection 18(6) was intended to operate concurrently to the APPs, particularly APP 13; the Explanatory Statement to the Principles states that subsection 18(6) is intended to operate in accordance with the Privacy Act.

A breach of the CEM's obligations under Part VIIIA of the National Health Act could be an interference with the privacy of an individual, entitling an individual to make a complaint about this to the Information Commissioner under Part V of the Privacy Act (see section 132E of the National Health Act). Part V of the Privacy Act sets out processes for privacy complaints, which includes Information Commissioner conciliation and determinations.

Although this is not specifically referred to in the Principles or its Explanatory Statement, in practice this means that the Information Commissioner has an independent oversight role of subsection 18(6) decisions and personal information as used in data matching.

If individuals are not satisfied with the CEM's decision under subsection 18(6) in relation to their personal information, they have the opportunity to complain to the Information Commissioner. This means an independent body will assess their privacy complaint.

Part IX of the Privacy Act provides that an application may be made to the Administrative Appeals Tribunal for review of a privacy determination made by the Information Commissioner. As a result, although there is no provision for independent merits review within the Principles, the structure of the National Health Act and the Principles, and their interaction with the Privacy Act, effectively provide individuals with alternate opportunities to seek review of the CEM's decisions under subsection 18(6).

Parliamentary oversight

The Committee has asked for advice as to:

- **why it is considered that the technical standards are not legislative instruments; and**
- **why it is considered appropriate that the technical standards are not subject to publication.**

To provide further context around this issue, extensive stakeholder consultations for the data matching legislation were conducted from 2018 with peak bodies. The Department of Health committed to ensuring the Principles would contain appropriate governance, provide privacy protections and set out standards for the use of matched data. Section 6 was included in the Principles after the Department agreed with requests made by stakeholders that the Principles should require technical standards reports.

The technical standards are administrative rather than legislative in nature, and therefore it is not appropriate for them to be a legislative instrument.

Section 6 of the Principles sets out specific requirements for the matters which must be dealt with in technical standards in relation to each authorised data-matching program. The CEM and authorised Commonwealth entities are required to comply with those technical standards.

The wording in subsection 6(1) requires the CEM to 'prepare and maintain' technical standards. It does not require the CEM to refer to the 'making' of technical standards. This is an important distinction which demonstrates that the technical standards are administrative, as they are prepared and maintained on an ongoing basis. If the technical standards were legislative, it is expected they would be "made", and then left in force for the CEM or authorised Commonwealth entity to comply with.

The Committee has indicated that section 132B(3) of the National Health Act requires an authorised Commonwealth entity to comply with technical standards. In fact, section 132B(3) requires an authorised Commonwealth entity to comply with any other terms and conditions relating to the matching of information as determined by the CEM. The technical standards are not terms and conditions for the purposes of section 132B(3) and would not be considered terms and conditions unless they are determined to be so in writing, by the CEM.

Subsections 6(3) and 6(4) of the Principles do require compliance with the technical standards, but only by the CEM and any authorised Commonwealth entity. There are no requirements for any other entity to comply with technical standards, nor do the technical standards affect the rights or obligations of an individual.

Commonwealth entities must be authorised to match data on behalf of the CEM, under subsection 132B(2) of the National Health Act, before being required to comply with any technical standards. In practice, this will occur by mutual agreement between the authorised Commonwealth entities.

Effectively, the technical standards were intended to operate as a plan and a statement of intent as to how a data match will be conducted, to ensure that the CEM and/or any authorised Commonwealth entity are aware of the intended parameters. This is supported by the Explanatory Statement to the Principles, which states that subsections 6(3) and 6(4) are intended to ensure that technical standards are 'considered, documented and complied with, to promote clarity and consistency with matching information under section 132B(1) [of the National Health Act]'.

The technical standards will be very detailed from a process and technological perspective, and will vary across data matching programs. There may be several technical standards being maintained for different authorised data-matching programs operating concurrently.

Technical standards will also require frequent updating. It is important that technical standards be able to be updated immediately while an authorised data-matching program is ongoing. If an issue with the data matching program is identified (such as the data fields or security features) it is critical the technical standards are able to be urgently updated. The updated technical standards are then kept as a record.

The requirements associated with amending a legislative instrument would limit the flexibility for the CEM to deal with issues associated with the operation of the technical standards as they arise, resulting in risks to the integrity of the data matching program.

It is not intended that the technical standards will be published. Publication of the technical standards may undermine compliance processes and activities due to the types of detailed information they will contain.

For example, publishing the specifications of data matches, specific risks, controls and security features could allow people to structure false claiming to avoid detection, or plan IT cyber-attacks, based on this information. There is a public interest in ensuring the integrity of Medicare programs and this outweighs the possible benefits of making technical aspects of the compliance program publicly available.

With regards to publishing the technical standards, the 'Guidelines on data matching in Australian Government administration', issued by OAIC, do not recommend publication of the technical standards reports (which set out data fields).

During consultation with the OAIC, it was cognisant of concerns about prejudicing compliance action by publishing specifics. When the Department of Health agreed to include the requirement for technical standards to be made in relation to data matching, the OAIC did not raise any concerns with this approach.

For these reasons, it is not appropriate for technical standards to be made as legislative instruments.