Australian Privacy Foundation

Supplementary Submission No. 2 – 22 May 2009

Introduction

This Supplementary Submission provides the APF's response to the PIA Report made available by the agency too late for consideration in previous Submissions and in the Committee hearings.

Summary

Far from allaying concerns, the PIA Report actually increases the level of the APF's concern about the proposal.

This is a bid for yet more privacy-breaching powers, without the justifications, and without the controls, that are essential when the public interest in the management of public funds conflicts with patients' interests in the privacy of their personal data.

The APF confirms the statements it made in its two previous Submissions, and the one-page summary of its position in its Supplementary Submission of 6 May 2009, a copy of which is attached.

The remainder of this document addresses specific aspects of concern.

1. Disclosure of Identified Patient Data

At multiple locations, the Report confirms that substantial amounts of patient data are involved, e.g.:

10. The proposed amendments will have a privacy impact because they will provide Medicare Australia with authority to give a notice to produce documents to persons to substantiate a Medicare benefit paid in respect of a service and the person will be required to comply.

11. This may involve the disclosure of information from a patient medical record to Medicare Australia.

45. This includes the disclosure of health information (as defined in the Privacy Act 1988) and does not exclude excerpts from a patient's medical record where they are relevant to substantiating the benefit paid.

76. The proposed legislative amendments will enable the CEO of Medicare Australia to require a practitioner or another person to produce documents in respect of a service to substantiate a Medicare benefit paid in respect of that service. This will include the power to require production of documents containing health information about an individual.

85. It is expected that compliance audits will require the production of documents such as appointment books, receipts and referrals and that excerpts from patient medical records will not be relevant to audits conducted in relation to <u>some</u> Medicare services [and hence <u>will</u> be relevant to many].

2. Procurement of Breaches of the Privacy Act

While presenting evidence to the Senate Committee, the APF expressed concern that the agency may have been causing practitioners to not only abuse the privacy of their patients, but also to breach the (already very weak) provisions of the Privacy Act.

It is apparent from the PIA Report that this is indeed the case (emphases added):

28. While many practitioners cooperate voluntarily with requests from Medicare Australia during a compliance audit, some do not respond or refuse to cooperate with a request.

29. The average non-response rate for compliance audits of Medicare services during this period was around 20%.

73. At present many practitioners voluntarily provide health information, including patient medical records, to Medicare Australia during compliance audits.

Unauthorised disclosure of patient data is a breach of patient privacy.

NPP 2.2 requires that a disclosure be "reasonably necessary for the protection of public revenue". (This provision is grossly privacy-abusive and the APF and others vociferously opposed it when the legislation was drafted).

But this clause emphatically does not authorise disclosure of the records in the circumstances under discussion. The disclosure does not protect the public revenue; it enables the medical practitioner to defend themselves against an express or implied accusation by the agency.

These disclosures by practitioners are in breach of the National Privacy Principles.

The agency has therefore been procuring breaches of the law by practitioners.

Moreover, given that the non-response rate is so low (20%), there appear to have been, and to continue to be, large numbers of unauthorised disclosures of patient data under the current arrangements.

This Bill asks the Parliament to take responsibility for the transgressions of practitioners and the agency, and to solve the problem by granting the agency greatly increased powers which regularise the abuse.

The Parliament should under no circumstances be a party to underhand means of extensions of Executive powers, on the basis of 'we do it anyway, and it may be in breach of the law'.

3. Sufficient, Suitably Controlled Powers Already Exist

36. Part IID of the Medicare Australia Act 1973 provides Medicare Australia with the power to require a person to provide information or produce documents where there are reasonable grounds for believing the information or documents may be relevant to the commission of a criminal offence or civil contravention.

37. Part IID also gives Medicare Australia powers of search and seizure (which extend to clinical records) where criminal offences or civil contraventions are suspected

Sufficient powers already exist, where there are reasonable grounds for suspicion that a civil contravention has occurred.

The APF supports controlled powers where clear justification exists and the matter is sufficiently serious to warrant the privacy intrusion. The APF does not accept that additional powers are justified, beyond those already, and properly, provided to the agency by the Parliament.

4. The New Powers Sought Are Not Subject to Proper Justification

42. In practice, practitioners and services audited under this project will be identified through Medicare Australia's risk assessment process where there is found to be a medium to high risk that the Medicare benefits paid may exceed the amount that should have been paid.

The expression "in practice" is a cause for serious concern.

The law should dictate that each decision to demand personal data must be based on reasonable grounds to believe that overpayment has occurred.

The agency must be required to demonstrate, in each case, that:

(a) grounds for suspicion exist; and

(b) those grounds are adequate to justify the privacy invasion involved.

The relevant words in the Bill are merely "reasonable concern [that overpayment has occurred]" (cl. 128AAD(1)).

The forumulation in the Bill:

(a) is weaker than 'reasonable grounds for believing that a contravention has occurred'; and

(b) fails to in any way balance the significance of the matter against the privacy interest.

5. Blame-Shifting to the Practitioner

54. Individual practitioners will be able to select the documents which they consider most aptly substantiates the service from the range of information available to them.

55. This means that the practitioner (or specified person) is responsible for deciding which documents address the compliance concern.

These statements create the pretence that disclosure of personal data will be the fault of the practitioner not the agency.

The statements are in any case a gross misrepresentation of what the Bill actually contains:

"The CEO may require the [practitioner] to produce to the CEO any document, or extract of any document, that is relevant for the purpose ..." (cl. 129AAD(4)).

The statements in the PIA are misleading.

6. Pretence that Consultations Were Meaningful

60. ... Feedback from stakeholders has been used to assist the design of the IMCA initiative, in the drafting of proposed legislative amendments and the development of this PIA.

On the contrary, it does not appear that **any** aspect of the APF's submission was reflected in the Bill.

7. Misleading Suggestion that Practitioners Can Blackline Copies

83. If the practitioner identifies that an excerpt of a patient medical record is the most appropriate document to address the audit concern, they will be able to censor the excerpt so that only the relevant information is provided Medicare Australia.

No such provision could be located in the Bill.

Further, no requirement exists in the Bill that the agency must instruct the practitioner to black out non-relevant personal data.

Moreover, cl. 129AAD(6)(c) explicitly requires the agency to specify "how the document, extract or copy is to be produced". This would override any implicit freedom the practitioner might otherwise have had.

In short, the statement in the PIA Report para. 83 is false, and appears to be an attempt to mislead the reader.

8. De-Identification is Impractical

De-identification is impractical in the circumstances.

The APF rejects the suggestion in 91. that "[omitting] the name of the person in the notice ...was a reasonable compromise". Such a measure achieves nothing, and is not in any sense a worthwhile form of privacy protection.

9. Absence of Any Requirement for Transmission Security

The discussion of security in 172.-179. fails to even mention secure transmission, and fails to specify that secure transmission facilities be used.

10. Non-Credibility of the Agency

115. "Medicare Australia won the inaugural Australian Grand Award for Privacy in 2008 ... "

Medicare has been a serial privacy-invader over an extended period. The APF was not involved in these Awards, and is not in agreement with the Privacy Commissioner's judgement on this matter.

It is up to the Parliament to reject unreasonable demands by agencies for excessive powers, and to impose clear and effective controls.

The public does not have confidence in the agency's handling of personal data, and under no circumstances should the Parliament place any reliance on the agency's goodwill. Such powers as the agency is given must be expressly limited, and subject to express controls.