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AMA SUBMISSION

SENATE STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

INQUIRY INTO HUMAN SERVICES (ENHANCED SERVICE DELIVERY) BILL 2007

28 February 2007

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HUMAN SERVICES (ENHANCED SERVICE DELIVERY) BILL 2007

Introduction

The AMA welcomes the opportunity to provide a submission to the Senate Standing Committee on Finance and Public Administration inquiry into the Human Services (Enhanced Service Delivery) Bill 2007 that seeks to establish the government's proposed Access Card.

The AMA is the peak medical organisation in Australia and the opinion leader in e-health. We have been intimately involved in almost every Federal Government e-health initiative for the last 10 years. Importantly it was the AMA together with the Royal Australian College of General Practitioners that, in the face of initial resistance by the Federal Government, established the General Practice Computing Group. The record shows that the AMA has significant credentials when it speaks on matters that relate to e-health.

The AMA has participated in early discussions around the development of Smart Card technology and we criticised the earlier clumsy attempts to introduce this technology in Tasmania as part of the elusive HealthConnect concept.

There is no doubt, however, that Smart Card technology delivers a significantly improved level of security and functionality that will move us to the next level in technological progress.

The AMA has contributed to public consultation on the Access Card and copies of AMA submissions to the Access Card Consumer and Privacy Taskforce and the Department of Human Services are available at www.ama.com.au

Following release of the exposure draft of the Human Services (Enhanced Service Delivery) Bill 2007 the AMA provided a submission to the Department and publicly expressed its concerns about key elements of the draft bill. Since that time the Department of Human Services have met with the AMA on at least two occasions to discuss these issues.

It is important to note, however, that the AMA again publicly expressed its concern that the consultation period on the bill was very short and scheduled over the Christmas and New Year holiday period. Given the level of public interest around this Bill it is difficult to understand why the Government appears to be risking the support it has for the Access Card in an effort to rush consultation.

There are a number of key areas of concern for the AMA in the Access Card bill, two of which are the issue of age eligibility (Section 22(b)) and the potential for function creep.

Of serious concern is that the Government's actions in relation to age eligibility in the Access Card bill represents function creep – and this before we have hardly begun on the road to the Access Card. The Australian public should be extremely concerned that even at this very early stage the Government is using the opportunity of the Access Card bill to run an agenda, focussed on a dramatic change to existing policy related to independent access of young people to health care. This does not auger well for public trust in the Government to prevent

function creep in terms of the purposes of the Access Card into the future or to trust, where not legislated, its stated "intent".

The following provides details around the AMA's key concerns related to the Human Services (Enhanced Service Delivery) Bill 2007.

Age Eligibility – Division 2, Section 22 (b)

Following two days of media focussed on some of the concerns outlined in our submission the AMA was very disturbed by the misleading press release issued by Minister Hockey on 24 January 2007, titled "AMA Gets it Wrong". In particular this responded to the AMA position on the proposed age of eligibility for an Access Card - one of a range of important issues raised in our submission in response to the exposure draft of the Access Card legislation.

The press release incorrectly stated that the AMA, in its submission and in its public statements, contends that under the proposed legislation, nobody under the age of 18 will be eligible for an Access Card.

In fact the AMA's concern is, and remains, that the age at which a person automatically has a **right** to obtain an Access Card – as opposed to the option merely to apply for one and seek an exemption from the age criterion – has been set at 18 in the proposed legislation. Currently, however, the Health Insurance Act provides that all Australians are eligible for Medicare benefits but access is limited by government guidelines that establish the age at which a person can obtain a Medicare Card. The current age at which a person may independently apply to obtain a Medicare card is 15.

The Office of the Access Card (OAC) and the former Minister for Human Services are on record as stating that the existing Medicare Australia Policy will continue to apply for provision of access cards. However, the AMA has pointed out that the Minister cannot legally give an undertaking which would fetter the discretion of this government or future governments. The only way to ensure that young people continue to have right to obtain services that require the use of the card is to enshrine that right in the legislation itself.

The AMA, in its discussions with the OAC, have been absolutely clear that its concern lies with the age at which a young person becomes entitled to a card as a matter or right: not at the age at which a person can merely apply for a card. The impression given by Minister Hockey's press release, therefore, is that the Government chose deliberately to misrepresent the AMA's position rather than to explain the Government's policy decision to raise the age of eligibility to 18 years of age.

Minister Hockey's statement that the "*…introduction of the access card does not change anyone's eligibility to receive Australian government health and social services and this includes people under the age of 18 who need their own access card*" is clearly incorrect on any reading of the draft legislation.

The draft legislation does represent a very significant change to the rights of young people. The Government has fundamentally misled the public in that the 24 January press release conceals from the community that the legislation as currently drafted does legally alter the age at which a person has the right to independently obtain health services under Medicare.

This is regardless of what the Government's "intentions" might be as implied in the press release.

If the Government intends that access to the new card is to operate under the same conditions as the current Medicare Card, in terms of eligibility for under 18 year olds, the legislation must be redrafted to reflect what is perceived as a public commitment.

The issue of age of eligibility as contained in the legislation goes to numerous questions as to the motives. History highlights the peculiar attention paid by this Government to reducing the rights of young people to independently manage their own health care and their privacy. It also highlights the value of the primary legislation over guidelines in protecting such rights.

Prior to July 2003 the Health Insurance Commission could only automatically release information to parents, where the child did not have their own Medicare Card, if the child was less than 12 years of age. If the child, did not have their own Medicare Card and was 12 years or over the consent of young person had to be obtained before access to information could be provided to the parent.

In July 2003, and based on legal advice that no legislative impediment existed, the HIC raised the age to 14 below which it would automatically release information to parents, where the child does not have their own Medicare Card.

Importantly, under both arrangements access to information by parents, with or without the child's consent depending on age, <u>only related to a child who did not have their own Medicare Card.</u>

However, in 2004 and on the basis of legal advice that legislation would be required, the Government launched an unsuccessful bid to develop legislation that would not only raise the age to 16. Below this age the proposed legislation would allow HIC automatically release information to parents, and could provide such access without the young person's consent and irrespective of whether the young person had their own Medicare Card.

The AMA's concerns around the rights of young people to independently seek and manage their own healthcare in the confidence that their privacy will be protected by their health care provider are based on serious concerns around the current and future health outcomes for young people.

The patterns of a lifetime are developed in youth and that includes those patterns that may contribute to chronic disease down the track. The way in which a young person views health care and has confidence in protection of their privacy will impact on their health seeking behaviour into adulthood and beyond. In turn this will establish patterns related to regular monitoring and screening requirements and seeking assistance to manage potential risks of disease.

It is unfortunate that when debate arises over independent access of young people to healthcare there is more frequently than not a focus on sexual health, access to contraception and STDs. While these are important issues for young people such a focus reflects a narrow understanding of the health needs of young people and the value of creating an environment where young people develop a good relationship with a health provider and the health system. If we are serious about:

- managing chronic illness;
- preventative health;
- creating patterns of behaviour that contribute to better health outcomes through timely and appropriate health management, and;
- ensuring that patients are able and willing to take some individual responsibility for their health,

we must remove any and all the barriers that change the rules under which young people currently have independent access to health care.

The reasons for the Government inclusion of an age eligibility provision remains very perplexing in the context of the persistent claims that the current practice, whereby young people under 18 are able to access a Medicare card, will be maintained for the purposes of the Access Card.

If the Government has no intention of changing the status quo then we are at a loss to understand the purpose of Section 22 (b).

In discussions with Government the AMA has asked this question numerous times and frustratingly has yet to receive a satisfactory answer. We have been given several reasons, and as each one is shown to be flawed, another reason is produced, suggesting to us that the real purpose of this provision is being concealed. The range of reasons have included:

- That the age limit has been designed to reduce the cost of administration in that the government does not want to write and offer Access Cards to persons who are not eighteen and over. However, the AMA has pointed out that there is no provision in the legislation that requires that a person receive notice of eligibility. It is purely an administrative decision taken by the government as to whom it will proactively notify. In the view of the AMA it is unacceptable that for simple administrative purposes, the government would enact a legislative provision that fundamentally changes the current policy position that provides equity of eligibility for young people 15-18 years. Any administrative arrangements that the government may choose for advising people about the card or inviting them to apply for the card should not dictate the law around eligibility to obtain a card.

- That the age of 18 represents the age of majority and the point of time in which young people have all the rights and responsibilities of a citizen. As a reason for fundamentally changing the current policy position this does not appear to have any relevance. It does raise questions as to whether in fact the policy change relates to the development of the Identity Card that we understand was under consideration through the Attorney-General's Department. It would be worthwhile seeking advice from the Attorney-General as to what advice his Department may have provided on this matter to the Department of Human Services and the OAC.

- That 18 is the age at which a person is most likely to access a range of government benefits. The AMA disputes this. In fact a young person under 18 is likely to be accessing a significant range of social service benefits and regardless there is no real relationship between eligibility to obtain a card and the level or number of benefits

being accessed. There is no provision to support type, level or range of benefits accessed as an eligibility criterion within the legislation.

- That across the different Departments and social services agencies there are a range of different ages for eligibility for different types of payments or services and it would be simpler to set an age that was consistent and relevant for all services. This incorrectly implies that the technology itself creates such a limitations. The AMA finds this perplexing. Smart Card technology, in terms of the uses to which the Government proposes to put the Access Card, acts as a key to obtaining information as to whether you are eligible for specific benefits. Simply holding the card does not represent a right to any specific benefit. The technology has the capacity to separately and securely verify eligibility for separate specific services or payments that may have different criteria. For example, where there may be a difference in age eligibility for a concession card and a Medicare Card, we are promised that such a system will be able to tell a doctor that the person is eligible to receive Medicare benefits (Medicare Australia data) and separately that the person is a valid concession card holder (Social Security data). Even using the basic Medicare Card this will be possible under the improved electronic payment and claiming system due to commence roll out later this year.

Recent events (week of 26th February 2007) indicate what is perhaps closer to the real intentions of Government and that is (through Section 22(b)) to impose upon the Australian public a very significant policy change in terms of independent access to health care services. As noted earlier this also represents serious and worrying evidence of function creep and leaves open to question the Government's stated commitment to limit the purposes and use of the Card.

It is the AMA's understanding that following growing opposition both within and outside Government a measure, described by the Minister for Human Services as a concession around age of eligibility, was presented to concerned Government and Opposition members for consideration. This measure includes draft guidelines that, inter-alia, establish 15 years old as the eligible age at which an individual may be issued with an Access Card. In addition the Minister has indicated that he will read the proposed Guidelines into the Third Reading Speech. The Minister's view as we understand it is that this makes clear the Government's "intent" in a situation where the legislation has to be passed before the guidelines can be established. The proposed provision 1 of the draft "compromise" guidelines states:

"A person 15 years and over may be issued with his/her own access card if eligible for Medicare or Commonwealth payments or pensions in their own right."

This guideline is inconsistent with Section 22(b) of the Bill and as such gives rise to concern as to intent. Given the Minister can change his mind on the guidelines read into a Third Reading Speech, immediately afterward or following the passage of legislation, or should Government policy alter, or further consultation persuaded Government not to introduce those guidelines, preserving Section 22(b) of the bill, in spite of its inconsistency with the proposed guidelines, raises significant concerns around intent.

If the proposed guidelines reflect the Government's intent, as it states, then what is the purpose of Section 22(b) of the bill and why should it remain?

Function Creep

Function creep is always one of the major dangers around the development of e-health initiatives. It not only relates to expanding the purpose or function of the card but most importantly the use of that data accessible through the card or identifier. The greatest threat is data linkage beyond the original purpose.

The AMA is aware that there is considerable public concern about the privacy implications of the Access Card, and also that the government has repeatedly assured the public that privacy will be strictly safeguarded. In the past specific steps to prevent function creep have been taken, such as the introduction of section 135AA of the National Health Act, prohibiting the linking of Medicare and pharmaceutical benefits data.

The AMA is of the view that there are measures and opportunities to protect against function and data linkage creep within this bill, and it is vital if the government is serious about the protection of privacy that these safeguards should be put in place.

The prevention of function creep in the case of the Access Card requires legislative limits on both the card itself and the Access Card number.

It is essential that the legislation contain legislated and clear purposes/functions for the embedded Access Card number, in order to ensure that any expanded use is protected under the current privacy regime. Dangers of function creep relate predominantly to the potential role and capacity to link vast amounts of data through that identifier where restrictions (technical, legislative or policy) do not exist or are inadequate.

The current bill sets out the object of the legislation and establishes strong provisions against the use of the Access Card for other purposes related to identity – although the AMA is concerned that these can be obviated by obtaining consent.

The OAC has told the AMA that use of the card, the information that can be stored within it and so forth are limited by the purposes of the Act. However, this provides very little comfort given the extraordinary breadth of the purposes clause, at section 7 of the Act that includes any activity or program of the government, even if not set out in legislation so long as it has been allocated to a "participating agency" for administration.

Consequently the AMA believes that this clause effectively sets no limits to the purposes for which the card can be used. Any programme the government chooses to invent can be included in this clause so long as its administration is entrusted to a "participating agency".

The Access Card number will be "created" by the Commonwealth and will be essential in enabling data linkage for authentication purposes. The Access Card Number is equivalent to an individual identifier. However, we do not have enough of an understanding of how the number will be set to state that it will in fact be a "unique identifier". We do know, however, that reliable data linkage and authentication requires an identifier.

The key question is does the legislation clearly set out legislative limits to the purposes for the Access Card and Card Number which would mean that both were protected from function creep by the provisions of the *Privacy Act 1988*?

For example, the purposes of the Medicare Number are outlined in the Health Insurance Act. However, the *Privacy Act 1988* ensures that the Medicare Number is protected from being used for other purposes than that stated in the Health Insurance Act. Basically the *Privacy Act 1988* prevents a Commonwealth established identifier being used for any purposes than that for which it was created.

Without a stated purpose for the Access Card Number in the bill it does not have the protection of the *Privacy Act 1988* and thus potentially provides the opportunity for extensive data linkage across Government or elsewhere. The use of the number in enabling these linkages must be limited to a specific purpose. That purpose must be protected by the same legislation that has served us well in protecting the Medicare Number against function creep.

It must be emphasised that seeking a legislated purpose within this Bill and the protection of the *Privacy Act 1988* to prevent function creep does not create a permanent barrier to future, agreed, extended uses of the Card or the identifier.

Because any extended use of the Card or identifier would require legislative amendment to their legislated "purposes", a strong and transparent process of consultation on such uses would be required as a basis for seeking such an amendment. It prevents a level of function creep through data linkage that is unacceptable to the Australian community. It would also appear to be consistent with what the government has stated to be its intentions.

In its submission to the OAC commenting on the draft exposure legislation the AMA highlighted areas of the Bill that provided extremely broad discretion for making a variety of decisions to both the Secretary and the Minister. For example, provisions that allow the Minister to set out guidelines by which identity may be determined and a catch all provision at item 17 (b) within the table under Section 17, Subsection (1) that affords the Secretary very broad discretion in determining what new sorts of information should be included on the register. Some of the discretionary provisions leave the door wide open for function creep in terms of both the purposes of the Card and the Card number, particularly given the extraordinary breadth of section 7.

It is the AMA's view that a clearly stated purpose for the Access Card Number would address many of the concerns around these discretionary powers. The use of discretionary powers that may represent function creep would be prevented by this measure that sets the limits on use within the Bill and also ensures protection under the *Privacy Act 1988*.

Governance and function creep

Protection of the Access Card and Number against function creep is also a function of the governance model. To date we have no information or understanding of what is to ultimately be proposed. We supported the view of the Consumer and Health Privacy Taskforce outlined in its first discussion paper, that the operations of the Access Card should be monitored and supervised by a body that is independent of the participating agencies. The current Bill appears to have ignored that view and in that context it does give rise to concerns about the implications for function creep.

The type of governance model established will be critical in determining whether the perversion of the technology into doing something quite different to that for which it was created can be prevented. The appointed governance body will have the role of determining

processes by which any expansion of the Access Card's functions are managed and this is the case even should the Bill be amended to include a clear purpose for the Access Card Number.

There is little doubt that development of the Access Card is a balancing act – all about ensuring the architecture of the card is capable of supporting other agreed and desirable applications into the future but at the same time delivering public confidence and trust that future functions will be determined and controlled in a transparent and open consultative manner.

Timing of the Legislation

The AMA has been most concerned at the apparent rush to push this legislation through. In our submission to the OAC on the exposure draft we expressed our concern that the consultation period had not only been extremely short but was scheduled over the Xmas and New Year holiday period. Given the strong public interest in the Access card it is difficult to understand why more time would not be allowed for the exploration and resolution of some of those concerns.

The Office of the Federal Privacy Commissioner, in its submission on the exposure draft of the Bill also expressed its concerns around timing of the legislation. It noted that there was a risk the legislative measures could potentially pre-empt the finalisation of important design and policy considerations and that these should be open to public scrutiny before the legislation is enacted.

The AMA is also extremely concerned at the three-stage process being proposed for the legislation. In his second reading speech to the Parliament the Minister for Human Services, Mr Ian Campbell, acknowledged that the legislation was incomplete. He stated that later legislation would deal with the review and appeal processes for administrative decisions, further elements of information protection and legislative issues relating to the use of the card.

It is the view of the AMA that the legislation should only come forward as a comprehensive legislative package in order to provide stakeholders and the wider community with certainty.

For further information please contact in the first instance Ms Julia Nesbitt, Director, General Practice and E-Health Department, Federal AMA on 02 62705462.