Comments on the

Exposure Draft

# Healthcare Identifiers Bill 2010

## A Bill for an Act to provide for healthcare identifiers, and for related purposes

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Thank your for the opportunity to comment, but not for the timing. Numbers relate to the numbers in the draft legislation.

**4. Act to bind the Crown**

(2)

The Crown should be liable to be prosecuted for an offence against this legislation.

If a mistake is made in matching the person who provides or receives healthcare to the relevant health information, and that mistake is the fault or stems from an omission of the Crown or a servant or agent or contractor or consultant of the Crown, then the Crown should be liable.

There is no valid reason in any form of law – constitutional, administrative, commercial, etc – why a body providing a service (directly or through a contracted party) should not be held accountable if misfeasance, malfeasance or nonfeasance is involved where death or serious injury/damage or loss occurs.

A test of the equity of this provision is:

> *Would the Crown accept this clause if it operated in reverse. That is, if a person/organisation providing services to the Crown acting wrongly or inappropriately or incompetently, but could not be held liable for his or her or its actions.*

Concomitant changes should be made throughout the document.

**Under 5. Definitions**

**service operator** means:

(b) 'another entity prescribed by the regulations.'

Parliament should not permit this wording, which would allow the sale of the health identifier business away from the statutory safeguards and supervision of Medicare to any corporation wanting to operate in the health business, with or without experience and a good track record, whether or not Australian or foreign.

Parliament should insist that subclause (b) is removed, and that any proposed transfer of the healthcare business away from Medicare must be taken before the Houses of Parliament for approval.

**10. Service operator's duty of confidentiality**

The service operator must be held accountable in corporate terms, as well as a 'person' being held responsible for breaching confidentiality.

While the bold headline mentions 'service operator', the subclauses refer only to 'person'. A corporate entity, including the government and/or its departments, agencies, servants or contracted service providers, must be held accountable as well as an individual employed by the government/etc.

The government must be responsible for its employees and their actions, and no attempt should be made – as here – to weasel out of normal obligations to Australians being provided with health care, or providing health care.

Any concomitant clause should be similarly changed.

**16. Use of identified for insurance and employment prohibited**

We recommend that the word 'superannuation' be included in the wording.

**17. Unauthorised use or disclosure of healthcare identifier.**

See 10. above. The corporate entity, whether or not it is the Crown, must also be held accountable, as well as the 'person' being held accountable.

Clauses must be added to this section to cover situations where the information is not overtly 'disclosed', but is incompetently mislaid, lost or insufficiently protected.

Examples include a mailed disk containing healthcare identifiers which fails to arrive at its destination, or a computer laptop containing protected information which is left in a vehicle and then both vehicle and computer are stolen, a thumb drive left in an airport frequent flyer lounge, a reel of data storage tape consigned to a courier company which loses it, or the data/information is distributed electronically to a person or entity to which it should not be distributed.

**19. Relationship to State or Territory laws**

Words should be added to clause (2) so that the lesser penalty, either under State or Territory law, is the one to be applied.

In passing, Civil Liberties Australia abhors any suggestion that powers be given to government to 'forum shop' for the type of prosecution and penalty desired.

**21. Annual reports – service operator**

Under clause (1), after '…the end of each financial year', add the words "but, under any circumstances, within a maximum of two months"…

Under the same clause, the word "breaches'" should be added after the word "activities". To clarify, the changed wording is designed to make the service operator responsible for self-reporting any breaches the service operator or its people have made.

**Timing of the consultations**

Finally, we note that the request for comment on this draft legislation was issued on 10 December, with a closing date of 7 January 2010.

We note that the public servants within the Health Department will have been able to enjoy a break over Christmas and New Year while expecting civil society, in the form of unpaid volunteer organisations, to provide unrecompensed analysis and input into making the legislation as good as it can be.

CLA raised this timing issue at the face-to-face consultations, and warned the department against doing exactly what the department has done in terms of timing.

In our opinion, there could be no more contemptuous action on the part of the department, representing the government, than to treat the consultation process, and civil society organisations and people who contribute to it, in this manner.

We trust that the public servants of the Department of Health enjoyed their Christmas and New Year break.

We request that the department never, ever do something like this again, and we ask that our request be communicated to the Secretary of the Department for her to issue an instruction to the appropriate effect. Whether she chooses to apologise for the abysmal behaviour of her staff is up to her.

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