



**Australian  
Privacy  
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14 February 2012

Senator C. Moore  
Chair  
Senate Standing Committee on Community Affairs  
Parliament House  
Canberra ACT 2600

Dear Senator Moore

**Re: Inquiry into the PCEHR Bills  
Supplementary Submission re Governance**

While we were giving evidence to the Committee on Monday 6 February, Committee members requested further information.

Specifically, they requested APF's thoughts about appropriate amendments to the Bills in order to overcome the serious deficiencies that have been identified in the governance aspects of the PCEHR.

We attach our specific proposals in relation to the governance aspects of the Bills.

There are other serious deficiencies in the Bills, which also need to be addressed prior to their passage. (These relate to such matters as pre-controls and post-controls against inappropriate access, support for effective pseudonymity, etc.). However, the Committee asked for additional information specifically in respect of governance, and we have restricted the attached document to that aspect alone.

We prepared it immediately following the Hearing. We held off submitting it for a week, because it had been indicated to us that additional written questions may be sent to us. If we have not addressed all of the Committee's questions, we would be pleased to provide further clarifications.

Thank you for your consideration.

Yours sincerely

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**Australian Privacy Foundation**  
**Supplementary Submission**  
**Governance**

7 February 2012

The APF submits that the following changes are necessary to the Bills prior to their passage, in order to address the enormous deficiencies in governance inherent in them at present.

### **1. An Independent Governance Body**

As currently proposed, there is no governance structure or processes, and all power is in the hands of the Secretary of DoHA.

This is completely inappropriate, even in the very short term. The reasons include the following:

- DoHA is a policy agency, and has a serious lack of competency in operational matters
- DoHA is a Commonwealth agency, and cannot represent the many other categories of stakeholder, including the other eight jurisdictions, health care providers, health care consumers and software providers
- DoHA has earned no trust whatsoever from consumer and privacy advocates, because it has consistently excluded them from consultative processes, has ignored most of their communications, and has refused to establish permanent arrangements
- if DoHA were permitted even short-term, interim powers, the agency would use them to entrench structures and processes that advantage Commonwealth public service agencies over all other stakeholders

Further, it is important that the Parliament itself make the critical decisions about the System Operator, and not permit government agencies to impose their own decisions through delegated legislation.

It is essential that the Bills be amended to create and empower an Independent Governance Body of an appropriate kind, in which DoHA is a participant, and certainly not the sole member.

In cl. 14, the Identity of the System Operator needs to be changed from the Secretary to the Independent Governance Body.

### **2. The Appropriate Governance Model**

It appears to the APF that the appropriate model on which the design of the Independent Governance Body should be based is that of a statutory corporation.

This requires the specification of a Board, with full powers and responsibilities in relation to the system's operation.

However, irrespective of the form that the Independent Governance Body takes, it is essential that it be expressly subject to all of the mechanisms that ensure transparency and accountability of such operations, including FOI, the Ombudsman and the ANAO.

### **3. Governance not Advice**

The Bills before the Parliament would create an Independent Council, but one that is merely Advisory.

Advice is not governance. Governance depends on powers.

The Independent Advisory Council needs to be converted into the Board of the Independent Governance Body, with full powers and responsibilities in relation to the operation of the PCEHR.

Elements of cls. 24-37 need to be carried across into the replacement clauses that create the Independent Governance Body and its Board.

#### **4. Representation on the Independent Governance Body**

Particular attention needs to be paid to the provisions of cls. 26-27 in relation to the composition of the Council, now Board.

It is essential that the Board has health care consumer interests at its core, but also has the responsibility to reflect the needs of the other stakeholders, in particular in all nine jurisdictions, and in the health care sector.

Additional provisions are essential in relation to the Chair and Deputy Chair.

The Chair and Deputy Chair must not be public servants, and must not be clinicians. They need to be people of appropriate standing in the community, who are independent from government agencies, independent from health care providers, and independent from other relevant service providers, and who are cognisant of and sympathetic to the needs of health care consumers.

#### **5. Complaints-handling**

The APF has submitted on multiple occasions that the OAIC and the Privacy or Information Commissioners, in their current form, are not appropriate as the PCEHR oversight agency. The reasons for this include:

- the OAIC's jurisdictional limitations, including the very large number of health care providers that are subject to State laws, both public and private sector
- the OAIC's extremely limited powers
- the OAIC's existing commitments to other priorities, many of which are not privacy-related and to some extent are even in conflict with the privacy interest
- the OAIC's extremely poor record during the last 7 years, during which it has been protective of government and business interests and close to hostile to privacy interests, and has handled complaints in a highly bureaucratic and obstructionist manner, and very slowly

It is essential that the OAIC be provided with the necessary responsibility and powers, to ensure that the privacy protections are real rather than imaginary. The necessary enhancements are as follows:

- the OAIC must have an explicit, primary and strong responsibility to protect privacy, with the need to balance privacy against other interests as a constraint, not an objective
- the OAIC must be provided with substantial powers in relation to privacy and related consumer matters
- the OAIC must be required to operate transparently, including publication of details of its investigations, and must not be able to suppress details in order to protect government agencies or private sector organisations
- the OAIC must be required to institute standards-compliant and efficient complaints-handling and complaints-finalisation processes
- the OAIC must be required to investigate complaints not only about specific invasions of privacy, but also about business processes
- the OAIC must be required to investigate complaints submitted not only by affected individuals, but also by representatives and advocates
- the OAIC must be allocated the necessary resources to perform its functions

It is also essential that the sanctions in the Bill be upgraded, as follows:

- to impose responsibilities and sanctions on all parties, including government agencies and government agencies' employees and contractors
- to create additional criminal offences for serious instances of abuse and negligence