
Healthcare Identifiers Bill 2010 and Healthcare Identifiers (Consequential Amendments) Bill 2010

To Senate Community Affairs Committee

5 March 2010

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About the Law Council of Australia

The Law Council of Australia (**Law Council**) is the peak organisation representing the Australian legal profession on issues of national and international concern. The Law Council advises governments, courts and other federal agencies on how the law and the justice system can be improved on behalf of the profession and for the benefit of the community.

The Law Council's Constituent Members comprise the state and territory law societies, bar associations and, as of 2007, the Large Law Firm Group, all of which are more fully identified at **Attachment A** to this submission.

Acknowledgment

The Law Council acknowledges the assistance of the Privacy Law Committee of its Business Law Section in the preparation of this submission.

Background

On 24 February 2010, the Senate referred the Healthcare Identifiers Bill 2010 (**Bill**) to the Senate Community Affairs Committee for inquiry and report (**Inquiry**).

The purpose of the Bill is to provide a way of ensuring that healthcare providers and healthcare recipients are correctly matched to health information that is created when healthcare is provided. This purpose is to be achieved through the process of assigning a unique identifying number to each healthcare provider and healthcare recipient.

The Law Council welcomes the opportunity to respond by way of this submission to this Inquiry, the purpose of which is to consider:

- privacy safeguards in the Bill;
- operation of the Healthcare Identifier Service, including access to the Identifier; and
- relationship to national e-health agenda and electronic health records.

In view of the significant privacy implications of this legislation, the Law Council is concerned with the extremely short timeframe provided for the response to this Inquiry and for the Committee's subsequent reporting.

Introduction

The United Nations *Universal Declaration on Human Rights* recognises privacy as an important human right.¹ The Law Council has previously made two submissions raising potential privacy concerns in relation to healthcare identifiers in particular:

¹ United Nations, *Universal Declaration on Human Rights*, art 12, available at <http://www.un.org/en/documents/udhr/>.

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1. On 5 January 2010, the Law Council made a submission to the Department of Health and Ageing (**Department**) in relation to the Exposure Draft of the Bill.² A copy of that submission is included for Committee's reference as **Attachment B**.
 2. On 20 August 2009, the Law Council responded by way of submission to the Department's paper, *Healthcare identifiers and privacy: Discussion paper on proposals for legislative support* (**Discussion Paper**).³ A copy of that submission is included for Committee's reference as **Attachment C**.

This submission will address:

- Recommendations previously made by the Law Council in its submissions regarding the Exposure Draft of the Bill and the Discussion Paper; and
- Other general issues regarding the Bill.

Law Council's Previous Recommendations

The Law Council welcomes the exclusion of clause 17(5) of the Exposure Draft of the Bill from the Bill currently before Parliament which regarded use and disclosure of a healthcare identifier (**HI**) as a strict liability offence. As previously noted by the Law Council, no evidence had been provided in the Department's Discussion Paper or its Discussion Paper, *Building the foundation for an e-health future: Update on legislative proposals for healthcare identifiers* (**Legislative Proposals Paper**),⁴ to demonstrate that the enforcement regime would have been enhanced by a strict liability offence.

However, the Law Council is concerned that none of its other recommendations had been adopted. These recommendations were:

1. That a clear statement of legislative intent regarding the limited use of a HI was imperative and the exceptions relating to use or disclosure authorised under "another law" at least needed to be clarified, if not removed. This recommendation was not adopted.
2. That provision for an independent audit or review process to address the privacy intrusive nature of the assignment, use and disclosure of HIs be included in the healthcare identifier legislation or in the Privacy Act. This recommendation was not adopted.
3. That a review of the Bill should take place earlier than the three years proposed in the Exposure Draft of the Bill given that it carries significant privacy implications. This recommendation was not adopted.
4. That, in order to improve the transparency of the process, consent of the individuals concerned should be obtained, as opposed to the use being authorised by legislation. This recommendation was not adopted.

² Law Council of Australia, *Exposure Draft of the Healthcare Identifiers Bill 2010*, 5 January 2010, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=1BC4A752-1E4F-17FA-D219-799C1877FF67&siteName=lca.

³ Law Council of Australia, *Healthcare Identifiers and Privacy*, 20 August 2009, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5FEA5CB8-1E4F-17FA-D216-601AE473A486&siteName=lca.

⁴ Australian Health Ministers' Conference, *Building the foundation for an e-health future: Update on legislative proposals for healthcare identifiers*, November 2009, 32, available at [http://www.health.gov.au/internet/main/publishing.nsf/Content/7EB863F2246F5A72CA2575ED00817A5B/\\$File/FINAL%20Update%20Proposals%20HI%20Service%20Nov%2009.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/7EB863F2246F5A72CA2575ED00817A5B/$File/FINAL%20Update%20Proposals%20HI%20Service%20Nov%2009.pdf).

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5. That a provision strictly limiting the suspension of NPP 7 should be inserted in Part 4 (now Part 3) of the Bill which deals with regulation of the healthcare provider's use or disclosure of information. This recommendation was not adopted.
 6. That in order to give effect to the Privacy Impact Assessment: Individual Healthcare Identifiers recommendations prepared by Mallesons Stephen Jaques on 26 August 2009, the Bill should specifically refer to the power of the Privacy Commissioner to commence investigations on her own initiative. This recommendation was not adopted, however the provision which previously restricted the Commissioner's functions concerning HIs to dealing primarily with complaints has now been removed.
 7. That the regulation making power granted under the Bill was very broad. This issue was not addressed in the Bill.
 8. That the offence of strict liability should be reconsidered. This recommendation was adopted.
 9. That, at the very least, an explanation be included on why an exception on the basis of a person's "personal, family or household affairs" was necessary in the context of the use and disclosure of HIs in the Minister's Second Reading Speech. This recommendation was not adopted.

Previous Law Council submissions relating to healthcare identifiers

As noted above, the Law Council responded by way of submissions to the Department's Discussion Paper and the Exposure Draft of the Bill. This section of the submission will primarily address the issues which were raised by the Law Council in these submissions.

Need to Limit the Use and Disclosure of Healthcare Identifiers

The Law Council previously recommended that, in view of the history of previous attempts to introduce a national identity card, there needed to be a clear statement of legislative intent that an individual healthcare identifier (IHI) is to be used for no other purpose than to facilitate electronic recording and communication of patient health information between a patient's healthcare team.

Under the legislation, service operators will be authorised to collect the identifying information and use that information for the purpose of assigning a HI to the healthcare recipient.⁵

Part 3 Division 2 of the Bill limits the extent to which HIs may be disclosed by the service operator. The service operator is authorised to disclose a HI to:

- (a) a healthcare provider, for the purpose of communicating or managing health information, as part of providing healthcare to a healthcare recipient;⁶

⁵ Healthcare Identifiers Bill 2010, clause 11.

⁶ Healthcare Identifiers Bill 2010, clause 17.

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- (b) a healthcare recipient, if asked to do so by that healthcare recipient or a person who is responsible for the healthcare recipient;⁷
 - (c) a registration authority, for the purposes of the registration authority registering the healthcare provider;⁸ and
 - (d) an entity, for the purposes of the entity issuing a key to the healthcare provider to enable the healthcare provider's identity to be authenticated in electronic transactions.⁹

Although these provisions appear to have been drafted to express a clear statement of legislative intent that the service operator should not disclose a HI other than for purposes authorised by the Bill, there are other parts of the Bill which appear inconsistent with these provisions.

For instance, clause 15, which deals with the service operator's duty of confidentiality, provides that a person does not commit an offence of breaching confidentiality if he or she uses or discloses the information for a purpose:

- for which the information was disclosed to the person; or
- that is authorised under "another law".

The use of the expression "another law" has the potential for allowing disclosure for any other lawful purpose not just a purpose related to the use of HIs for the management of health information.

Furthermore, clause 15 appears to be drafted very broadly when compared to other provisions in the Bill dealing with use and disclosure of healthcare information. Clause 24 of the Bill, for example, specifies that a healthcare provider is authorised to use or disclose a HI for the purposes of communication or managing information, as part of:

- The provision of healthcare to a healthcare recipient;
- The management, funding, monitoring or evaluation of healthcare;
- The provision of indemnity cover for a healthcare provider; or
- The conduct of health or medical research.

Additionally, the healthcare provider is authorised to use or disclose the HI if such use or disclosure is necessary to lessen or prevent a serious threat to an individual's life, health or safety, or a serious threat to public health or public safety.

The Law Council submits that such a narrower provision is more appropriate than a broad provision which allows disclosure for a purpose that is authorised under any law.

Further, clause 26 creates general offences for a person to use or disclose a HI that has been disclosed to him or her. Paragraph (2)(b) creates exceptions if the person discloses or uses the identifier for a purpose authorised under "another law". "Another law" is not defined in the Bill and the legislative intent is not clear as to which purposes under "another law" are contemplated.

⁷ Healthcare Identifiers Bill 2010, clause 18.

⁸ Healthcare Identifiers Bill 2010, clause 19.

⁹ Healthcare Identifiers Bill 2010, clause 20.

The Law Council again submits that a clear statement of legislative intent regarding the limited use of a HI is imperative and the exceptions relating to use or disclosure authorised under “another law” at least need to be clarified, if not removed.

The Need for Independent Audit or Review of the Use and Disclosure of Healthcare Identifiers

The Law Council noted in its previous submissions that there was a need for an independent audit or review process to address the privacy intrusive nature of the assignment, use and disclosure of HIs similar to the right of audit for the Office of the Privacy Commissioner (**Commissioner**) in respect of tax file number administration and credit reporting processes.¹⁰ The Law Council recommended that such a provision be included in the healthcare identifier legislation or in the *Privacy Act 1988* (Cth) (**Privacy Act**).

Clause 29(3) of the Bill provides that a HI is to be regarded as personal information for the purpose of s 27(1)(h) of the Privacy Act, under which the Commissioner is given the power to conduct audits of records of personal information maintained by agencies for the purpose of ascertaining whether the records are maintained according to the Information Privacy Principles. However, ss 28 and 28A of the Privacy Act give the Commissioner specific statutory power to undertake audits of agencies or organisations to ensure compliance with the Privacy Act in relation to tax file number administration and credit reporting processes, respectively. In view of the significant privacy implications of this legislation, a specific power to undertake audits in respect of HIs should be included in the Bill and the appropriate amendments of the Privacy Act should be made.

The Commissioner currently has a Memorandum of Understanding with the ACT Government which includes a commitment to conduct at least two audits of ACT Government agencies per financial year. According to her 2008-2009 Annual Report, the Commissioner selects audit targets based on a risk assessment analysis which takes into account previous audits and audit findings, complaints against ACT Government agencies, the amount of personal information held by an agency and the sensitivity of, and risk relating to disclosure of, that information.¹¹ The audits conducted in the 2008-2009 financial year found that the agencies generally had an appropriate level of compliance with the Information Privacy Principles. A benefit of an auditing function is that, where privacy risks are identified or where better privacy practice could be instituted, the auditors make recommendations concerning those aspects of the agencies' operations.

The Law Council further notes that the Discussion Paper had also indicated that the Commissioner would provide independent oversight of the Healthcare Identifiers Service and the handling of HIs by private sector healthcare providers. The Law Council believes that the Bill does not go far enough in achieving this intended oversight.

The Law Council welcomes the amendments of the Exposure Draft of the Bill now contained in Part 4 which had previously appeared to restrict the Commissioner's functions concerning HIs to dealing primarily with complaints. Clause 29 of the Bill provides that an act or practice that constitutes an offence under the Bill or the regulations in connection with the HI of an individual is treated as an interference with privacy under the Privacy Act and covered by s 13 of that Act. The implication of the removal of clause

¹⁰ *Privacy Act 1988* (Cth), ss 28 and 28A.

¹¹ Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report 1 July 2008 – 30 June 2009*, August 2009, 71, available at <http://www.privacy.gov.au/materials/types/download/9417/6961>.

18(4) of the Exposure Draft of the Bill¹² is that Commissioner's functions are not limited to those of dealing with complaints but extend to the full range of the Commissioner's functions under the Privacy Act.

Clause 35 of the Bill provides that a report on the review of the operation of the Bill must be prepared before 30 June 2013. The Law Council maintains its previous submission that a review of legislation which carries substantial privacy implications should be conducted earlier.

Proposals Relating to Use of Medicare Information and Use of Government Healthcare Identifiers by Private Sector Organisations

The Law Council previously noted the proposal in the Discussion Paper that Medicare use information from its Consumer Directory Maintenance Service to assign IHIs without the consent of the individuals concerned. However, the existing Information Privacy Principle (IPP) 10 does not permit the use of information for a purpose other than for which it was collected except in certain circumstances. One of these circumstances is with the consent of the individual. Another is where the use is authorised by law.

The Law Council has previously submitted that, in order to improve the transparency of the process, consent should be obtained, as opposed to the use being authorised by legislation. The Law Council maintains this submission, particularly as no explanation has been provided in the Legislative Proposals Paper as to why consent cannot be obtained.

The Bill also expands the scope of the type of entity authorised to disclose identifying information of a healthcare provider or recipient beyond Medicare to a "data source" which has been defined in clause 12(2) of the Bill as:

- (a) Medicare Australia;
- (b) the Veterans' Affairs Department;
- (c) any entity prescribed by the regulations.

The Law Council also noted that the existing National Privacy Principle (NPP) 7 provides that private sector organisations should not use Government identifiers. The Law Council recommended that the legislation contain strict limits on the suspension of NPP 7 to ensure that it does not extend to any other circumstances. Importantly, the Legislative Proposals Paper states that the healthcare identifier legislation "will provide that NPP 7 does not apply to the adoption, use and disclosure of individual identifiers by private sector healthcare provider organisations where this is undertaken for one of the purposes described". However, no specific reference to this exclusion has been made in the Bill.

The Law Council maintains its submission that a provision strictly limiting the suspension of NPP 7 should be inserted in Part 3 of the Bill which deals with use and disclosure of IHIs and other information.

Powers of the Privacy Commissioner

The Law Council noted in its submission to the Department regarding the Exposure Draft of the Bill that one of the Privacy Impact Assessments (PIAs) recently released in relation

¹² This provisions provided that an individual could complain about an act or practice which constituted an offence under the Bill to the Commissioner.

to the proposals concerning HIs suggested that the Commissioner should investigate interferences with privacy under the Bill either in response to a complaint or at her own instigation.¹³ However, clause 18(4) of the Exposure Draft of the Bill only made reference to the right of complaint by the individual, under Part V of the Privacy Act. Consequently, the Law Council submitted that, in order to give effect to the PIA, the Bill should specifically refer to the power of the Commissioner to commence investigations on her own initiative.

As noted above, the Bill no longer contains the provision which appeared to restrict the Commissioner's functions concerning HIs to dealing primarily with complaints. Arguably, the Bill no longer limits the Commissioner's functions in this manner as relevant to the HI context and the Commissioner will be able to commence investigations on her own initiative for breaches of privacy applicable under the Bill.

Regulations

The Law Council noted that the Bill makes numerous references to certain requirements being prescribed in the regulations. The Law Council remains concerned that the regulation making power granted under the Bill is very broad. Currently, at least some of the information that may be included in the regulations could potentially have implications on privacy. If matters are addressed by way of regulations, the Law Council would like to review those regulations before making conclusive statements about the Bill. The Law Council would welcome the opportunity to provide comments on these regulations and again suggests that draft regulations be made publicly available before the Bill is passed.

Unauthorised use or disclosure

Clause 26 of the Bill makes it an offence to use or disclose a HI. However, under clause 26(2)(b) such use or disclosure is permitted if it is "for a purpose that is authorised under another law". As noted above, the Law Council is concerned that this exception is too broad. Specifically, it is unclear what other laws are contemplated under this provision and whether these laws could potentially give rise to breaches of privacy.

"Personal, Family or Household affairs"

Clause 26(2)(c) of the Bill provides that it is an exception to an offence under clause 26(1) if the person uses or discloses the identifier "for the purposes of, or in connection with, the person's personal, family or household affairs".

The Revised Explanatory Memorandum to the Privacy Amendment (Private Sector) Bill 2000 (Cth) stated that the Privacy Act was not intended to affect the way individuals handle personal information in the course of their personal, family or household affairs.¹⁴ It also stated that the purpose of the relevant section of the Privacy Act was to confirm that the NPPs do not apply where information is dealt with in the context of an individual's personal, family or household affairs. It appears from the Revised Explanatory Memorandum that 'personal, family or household affairs' has the same meaning as 'other than in the course of business'.¹⁵

¹³ Mallesons Stephen Jaques, Privacy impact assessment Individual Healthcare Identifiers recommendations, 26 August 2009, 31.

¹⁴ Revised Explanatory Memorandum, Privacy Amendment (Private Sector) Bill 2000 (Cth), notes on clauses [106].

¹⁵ Revised Explanatory Memorandum, Privacy Amendment (Private Sector) Bill 2000 (Cth), notes on clauses [164].

It is not clear to the Law Council why an exception on the basis of individuals' personal, family or household affairs' is necessary in the context of the use and disclosure of HIs. No explanation is provided in the Discussion Paper or the Legislative Proposals Paper. The Law Council maintains its previous submission that, at the very least, an explanation of why this exception will apply should be made clear in the Minister's Second Reading Speech.

General Comments

'Certain purposes excluded'

The Law Council notes that clause 24(4) of the Bill specifically excludes certain use or disclosure of a HI of a healthcare recipient.

The Law Council submits that the expression "certain purposes excluded" be amended to "all other purposes excluded". Currently, the provision may be open to an interpretation that the use of word "certain" implies that purposes other than the facilitation of electronic recording and communication of patient health information between the patient's healthcare team and prevention of serious threat to person and public health and safety would authorise the use and disclosure of an IHI.

Consequently, the Law Council submits that clause 24(4) be redrafted to state the following:

"All other purposes excluded

(4) This section does not authorise the use or disclosure of the HI of a healthcare recipient for purposes other than those authorised under this Act, including, but not limited to, for purposes of communicating or managing health information as part of:

- (a) underwriting a contract of insurance that covers the healthcare recipient; or
- (b) determining whether to enter into a contract of insurance that covers the healthcare recipient (whether alone or as a member of a class); or
- (c) determining whether a contract of insurance covers the healthcare recipient in relation to a particular event; or
- (d) employing the healthcare recipient."

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.



Healthcare Identifiers and Privacy

To Department of Health and Ageing

5 January 2010

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About the Law Council of Australia

The Law Council of Australia (**Law Council**) is the peak organisation representing the Australian legal profession on issues of national and international concern. The Law Council advises governments, courts and other federal agencies on how the law and the justice system can be improved on behalf of the profession and for the benefit of the community.

The Law Council's Constituent Members comprise the state and territory law societies, bar associations and, as of 2007, the Large Law Firm Group (LLFG), all of which are more fully identified at **Attachment A** to this submission.

Introduction

The Law Council welcomes the opportunity to respond by way of this submission to the Exposure Draft of the Healthcare Identifiers Bill 2010 (**Bill**) prepared by the Department of Health and Ageing (**Department**).

The United Nations *Universal Declaration on Human Rights* recognises privacy as an important human right.¹ The Law Council has previously made submissions raising potential privacy concerns in relation to healthcare identifiers. In particular, the Law Council recently made a submission in response to the Department's paper, *Healthcare identifiers and privacy: Discussion paper on proposals for legislative support* (**Healthcare identifiers and privacy submission**).² Additionally, in 2007, the Law Council responded to the Discussion Paper by the Australian Law Reform Commission (**ALRC**), *Review of Australian Privacy Law*³ and the ALRC's Issues Paper, *Inquiry into the Commonwealth Privacy Act 1988*.⁴

The Law Council notes that the *Healthcare identifiers and privacy: Discussion paper on proposals for legislative support* (**Discussion Paper**) issued by the Australian Health Ministers' Advisory Council in July 2009 stated that the development and design of the Healthcare Identifiers Service (**HIS**) had been subject to an overarching and ongoing Privacy Management Framework. The Discussion Paper further referred to the National E-Health Transition Authority (**NEHTA**) publication, *Approach to Privacy* (July 2006) which recommended that a full Privacy Impact Assessment (**PIA**) of e-health proposals be conducted.⁵ The Law Council welcomes the recent publication of three PIAs.⁶

¹ United Nations, *Universal Declaration on Human Rights*, art 12, available at <http://www.un.org/en/documents/udhr/>.

² Law Council of Australia, *Healthcare Identifiers and Privacy*, 20 August 2009, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=5FEA5CB8-1E4F-17FA-D216-601AE473A486&siteName=lca.

³ Law Council of Australia, *Privacy Law*, 20 December 2007, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca.

⁴ Law Council of Australia, *ALRC Issues Paper "Inquiry into the Commonwealth Privacy Act 1988*, 8 February 2007, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=1F066F61-1E4F-17FA-D259-743972AD8F28&siteName=lca.

⁵ National E-Health Transition Authority, *Approach to Privacy*, July 2006, available at www.nehta.gov.au.

⁶ National E-Health Transition Authority, Release of the Healthcare Identifier Service Privacy Impact Assessments, available at <http://www.nehta.gov.au/connecting-australia/privacy/pias>.

This submission will address:

1. Issues previously raised by the Law Council in its Healthcare identifiers and privacy submission and how these apply in the context of the present Bill; and
2. Other general issues regarding the Bill.

Previous Law Council submissions relating to health privacy and identifiers

ALRC Review of Australian Privacy Law

In 2007, the Law Council responded to the Discussion Paper by the ALRC, *Review of Australian Privacy Law*⁷ and the ALRC's Issues Paper, *Inquiry into the Commonwealth Privacy Act 1988*.⁸

The Law Council supported a single set of Unified Privacy Principles (UPPs) applicable to Government agencies and private sector organisations. The Law Council also suggested harmonisation of Commonwealth, State and Territory privacy laws by way of referral of powers to the Commonwealth.

Furthermore, the Law Council acknowledged that specific regulation was required to address health privacy but questioned the benefit of industry specific codes against cost and complexity. The Law Council suggested that derogation from the UPPs be reconsidered, particularly in relation to industry specific codes.

Most relevantly to the present consultation, the Law Council acknowledged that ALRC proposals to restrict the use of unique identifiers were intended to prevent the development in stages of a form of identity card. However, the Law Council submitted that a Government agency assigning an identifier should be able to use it for the purpose of identifying an individual.

Healthcare identifiers and privacy: Discussion paper on proposals for legislative support

This section of the submission will primarily address the issues which were raised by the Law Council in its previous submission and how these apply in the context of the present Bill.

⁷ Law Council of Australia, *Privacy Law*, 20 December 2007, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca.

⁸ Law Council of Australia, *ALRC Issues Paper "Inquiry into the Commonwealth Privacy Act 1988*, 8 February 2007, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=1F066F61-1E4F-17FA-D259-743972AD8F28&siteName=lca.

On 20 August 2009, the Law Council made a submission in response to the Department's *Healthcare identifiers and privacy* discussion paper (**Discussion Paper**). That submission addressed the following issues:

1. the restricted scope of the Discussion Paper;
2. the need for independent audit or review to address the privacy intrusive nature of the proposals;
3. the proposals relating to use of Medicare information and use of Government healthcare identifiers by private sector organisations; and
4. the recommendations by the ALRC relating to privacy and health information.

A number of recommendations were made by the Law Council in relation to the issues above as they relate to privacy.

The Restricted Scope of the Discussion Paper and the Need to Limit the Use and Disclosure of Healthcare Identifiers

The Law Council noted that the scope of the Discussion Paper was restricted, particularly in the context of previous proposals for national identity cards and the potential for use of identifiers for purposes beyond identification for recording and communication of patient information.

The Law Council recommended that, in view of the history of previous attempts to introduce a national identity card, there needed to be a clear statement of legislative intent that an individual healthcare identifier (**IHI**) is to be used for no other purpose than to facilitate electronic recording and communication of patient health information between a patient's healthcare team.

Part 3 of the Bill limits the extent to which healthcare identifiers may be disclosed by the service operator. The service operator will assign a healthcare identifier to uniquely identify a healthcare recipient or healthcare provider. Furthermore, the service operator will be required to establish and maintain a record of healthcare identifiers that have been assigned and the information that the service operator has that relates to those healthcare identifiers.

The service operator is authorised to disclose a healthcare identifier to:

- (a) a healthcare provider, for the purpose of communicating or managing health information, as part of providing healthcare to a healthcare recipient;⁹
- (b) a registration authority, for the purposes of the registration authority registering the healthcare provider;¹⁰ and
- (c) an entity, for the purposes of the entity issuing a key to the healthcare provider to enable the healthcare provider's identity to be authenticated in electronic transactions.¹¹

⁹ Healthcare Identifiers Bill 2010, clause 11.

¹⁰ Healthcare Identifiers Bill 2010, clause 12.

¹¹ Healthcare Identifiers Bill 2010, clause 13.

Although these provisions appear to have been drafted to express a clear statement of legislative intent that the service operator should not disclose a healthcare identifier other than for purposes authorised by the Bill, there are other parts of the Bill which appear inconsistent with these provisions.

For instance, clause 10, which deals with the service operator's duty of confidentiality, provides that a person does not commit an offence of breaching confidentiality if he or she uses or discloses the information for a purpose:

- under the Bill or
- that is authorised under "another law".

The Law Council submits that the use of the expression 'another law' has the potential for allowing disclosure for any other lawful purpose not just a purpose related to the use of healthcare identifiers for the management of health information.

Furthermore, clause 10 appears to be drafted very broadly when compared to other provisions in the Bill dealing with use and disclosure of healthcare information. Clause 15 of the Bill, for example, specifies that a healthcare provider is authorised to use or disclose a healthcare identifier for the purposes of communication or managing information, as part of:

- The provision of healthcare to a healthcare recipient;
- The management, funding, monitoring or evaluation of healthcare; or
- The conduct of health or medical research.

The Law Council submits that such a narrower provision is more appropriate than a broad provision which allows disclosure for a purpose that is authorised under any law.

Further, clause 17 creates general offences for a person to use or disclose a healthcare identifier that has been disclosed to him or her. Paragraphs (2)(b) and (4)(b) create exceptions if the person discloses or uses the identifier for a purpose authorised under "another law". "Another law" is not defined in the Bill and the legislative intent is not clear as to which purposes under "another law" are contemplated.

The Law Council again submits that a clear statement of legislative intent regarding the limited use of a healthcare identifier is imperative and the exceptions relating to use or disclosure authorised under "another law" at least need to be clarified, if not removed.

The Need for Independent Audit or Review of the Use and Disclosure of Healthcare Identifiers

The Law Council noted in its Healthcare Identifiers and privacy submission that there was a need for an independent audit or review process to address the privacy intrusive nature of the assignment, use and disclosure of healthcare identifiers similar to the right of audit for the Office of the Privacy Commissioner (**Commissioner**) in respect of tax file number administration and credit reporting processes.¹² The Law Council recommended that such a provision be included in the healthcare identifier legislation or in the *Privacy Act 1988* (Cth) (**Privacy Act**).

¹² *Privacy Act 1988* (Cth), ss 28 and 28A.

Sections 28 and 28A of the Privacy Act give the Commissioner specific statutory power to undertake audits of agencies or organisations to ensure compliance with the Privacy Act in relation to tax file number administration and credit reporting processes. The current Bill makes no provision for a similar power to conduct an audit in relation to processes relating to healthcare identifiers.

The Commissioner currently has a Memorandum of Understanding with the ACT Government which includes a commitment to conduct at least two audits of ACT Government agencies per financial year. According to her 2008-2009 Annual Report, the Commissioner selects audit targets based on a risk assessment analysis which takes into account previous audits and audit findings, complaints against ACT Government agencies, the amount of personal information held by an agency and the sensitivity of, and risk relating to disclosure of, that information.¹³ The audits conducted in the 2008-2009 financial year found that the agencies generally had an appropriate level of compliance with the Information Privacy Principles. A benefit of an auditing function is that, where privacy risks are identified or where better privacy practice could be instituted, the auditors make recommendations concerning those aspects of the agencies' operations.

The Law Council further notes that the Discussion Paper had also indicated that the Commissioner would provide independent oversight of the HIS and the handling of healthcare identifiers by private sector healthcare providers. The Law Council believes that the Bill does not go far enough in achieving this intended oversight.

Clause 18 of the Bill provides that an act or practice that constitutes an offence under the Bill is treated as an interference with privacy under the Privacy Act and that an individual may make a complaint under the Privacy Act. However, the Commissioner has a range of other functions under the Privacy Act beyond dealing with complaints. The Bill appears to restrict the Commissioner's functions concerning healthcare identifiers to dealing primarily with complaints. Although clause 22 of the Bill provides for the Commissioner to make annual reports about her compliance and enforcement activities under the Bill, these activities appear to be restricted by clause 18 to dealing with complaints.

Furthermore, while clause 22 also provides for annual reports by the service operator, these reports relate to 'the activities, finances and operations of the service operator', which may not involve any particular focus on privacy issues relating to the use and disclosure of healthcare identifiers.

Although clause 23 also provides for a Ministerial review of the operation of the Bill after it has commenced operation, this review only needs to take place within three years. The Law Council submits that there should be an earlier review of this legislation which carries significant privacy implications.

The Proposals Relating to Use of Medicare Information and Use of Government Healthcare Identifiers by Private Sector Organisations

The Law Council noted the proposal in the Discussion Paper that Medicare use information from its Consumer Directory Maintenance Service (**CDMS**) to assign IHIs without the consent of the individuals concerned. However, the existing Information Privacy Principle (**IPP**) 10 does not permit the use of information for a purpose other than

¹³ Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report 1 July 2008 – 30 June 2009*, August 2009, 71, available at <http://www.privacy.gov.au/materials/types/download/9417/6961>.

for which it was collected except in certain circumstances. One of these circumstances is with the consent of the individual. Another is where the use is authorised by law.

The Law Council submitted that consent should be obtained, as opposed to the use being authorised by legislation, in order to improve the transparency of the process. The Law Council maintains this submission, particularly as no explanation has been provided in the Discussion Paper, *Building the foundation for an e-health future: Update on legislative proposals for healthcare identifiers (Legislative Proposal Paper)*,¹⁴ as to why consent cannot be obtained.

Additionally, the Bill has expanded the scope of the type of entity authorised to disclose identifying information of a healthcare provider or recipient beyond Medicare to a “data source” which has been defined in clause 5 of the Bill as:

- (d) Medicare Australia; or
- (e) the Department administered by the Minister administering the *Veterans’ Entitlements Act 1986*; or
- (f) a registration authority; or
- (g) an entity prescribed by the regulations.

The Law Council also noted that the existing National Privacy Principle (**NPP**) 7 provides that private sector organisations should not use Government identifiers. The Law Council recommended that the legislation contain strict limits on the suspension of NPP 7 to ensure that it does not extend to any other circumstances. Importantly, the Legislative Proposal Paper states that the healthcare identifier legislation “will provide that NPP 7 does not apply to the adoption, use and disclosure of individual identifiers by private sector healthcare provider organisations where this is undertaken for one of the purposes described”.¹⁵ However, no specific reference to this exclusion has been made in the Bill.

The Law Council submits that a provision strictly limiting the suspension of NPP 7 should be inserted in Part 4 of the Bill which deals with regulation of the healthcare provider’s use or disclosure of information.

General Observations

The previous section of this submission examined the Bill from the perspective of the comments made by the Law Council in its previous submission of 20 August 2009. However, the Law Council would like to raise some further concerns regarding the Bill.

¹⁴ Australian Health Ministers’ Conference, *Building the foundation for an e-health future: Update on legislative proposals for healthcare identifiers*, November 2009, 32, available at [http://www.health.gov.au/internet/main/publishing.nsf/Content/7EB863F2246F5A72CA2575ED00817A5B/\\$File/FINAL%20Update%20Proposals%20HI%20Service%20Nov%2009.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/7EB863F2246F5A72CA2575ED00817A5B/$File/FINAL%20Update%20Proposals%20HI%20Service%20Nov%2009.pdf).

¹⁵ Ibid.

Powers of the Privacy Commissioner

The Law Council notes that one of the PIAs recently released in relation to the proposals concerning health care identifiers suggested that the Commissioner should investigate interferences with privacy under the Bill either in response to a complaint or at her own instigation.¹⁶ However, clause 18(4) of the Bill only makes reference to the right of complaint by the individual, under Part V of the Privacy Act. No reference is made to the power of the Commissioner to instigate the investigation, which is allowed under Part IV of the Privacy Act.

The Law Council submits that in order to give effect to the PIA, the Bill should specifically refer to the power of the Commissioner to commence investigations on her own initiative.

Regulations

The Law Council notes that the Bill makes numerous references to certain requirements being prescribed in the regulations.¹⁷ The Law Council is concerned that the regulation making power granted under the Bill is very broad. Currently, at least some of the information that may be included in the regulations could potentially have implications on privacy. If matters are addressed by way of regulations, the Law Council would like to review those regulations before making conclusive statements about the Bill. The Law Council would welcome the opportunity to provide comments on these regulations and suggests that draft regulations be made publicly available before the Bill is passed.

Part 5 – Unauthorised use or disclosure

Clauses 17(1) and 17(3) of the Bill make it an offence to use or disclose a healthcare identifier. However, under clause 17(2)(b) and 17(4)(b) such use or disclosure is permitted if it is “for a purpose that is authorised under another law”. As noted above, the Law Council is concerned that this exception is too broad. Specifically, it is unclear what other laws are contemplated under this provision and whether these laws could potentially give rise to breaches of privacy.

Strict Liability

Clause 17(5) of the Bill provides that an offence against clause 17(3) is an offence of strict liability. The Law Council notes that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* provides that strict liability offences should only be used where the imposition of punishment in the absence of fault will enhance the enforcement regime.¹⁸ The Law Council submits that no evidence has been provided in the Discussion Paper or the Legislative Proposals Paper to demonstrate that the enforcement regime will be enhanced by a strict liability offence and therefore this offence should be reconsidered.

¹⁶ Mallesons Stephen Jaques, Privacy impact assessment Individual Healthcare Identifiers recommendations, 26 August 2009, 31.

¹⁷ Reference to regulations is included in the following provisions: clause 5 definitions of data source, identifying information and service operator; clause 6(3); clause 19(1); and clause 24.

¹⁸ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007, 25.

“Personal, Family or Household affairs”

Clause 17(4)(c) of the Bill provides that it is an exception to an offence under clause 17(3) if the person uses or discloses the identifier “for the purposes of, or in connection with, the person’s personal, family or household affairs”.

The Revised Explanatory Memorandum to the Privacy Amendment (Private Sector) Bill 2000 (Cth) stated that the Privacy Act was not intended to affect the way individuals handle personal information in the course of their personal, family or household affairs.¹⁹ It also stated that the purpose of the relevant section of the Privacy Act was to confirm that the NPPs do not apply where information is dealt with in the context of an individual’s personal, family or household affairs. It appears from the Revised Explanatory Memorandum that ‘personal, family or household affairs’ has the same meaning as ‘other than in the course of business’.²⁰

It is not clear to the Law Council why an exception on the basis of a person’s personal, family or household affairs’ is necessary in the context of the use and disclosure of healthcare identifiers. No explanation is provided in the Discussion Paper or the Legislative Proposal Paper. The Law Council submits that, at the very least, an explanation of why this exception will apply should be made clear in the Minister’s Second Reading Speech.

¹⁹ Revised Explanatory Memorandum, Privacy Amendment (Private Sector) Bill 2000 (Cth), notes on clauses [106].

²⁰ ²⁰ Revised Explanatory Memorandum, Privacy Amendment (Private Sector) Bill 2000 (Cth), notes on clauses [164].

Attachment A: Profile of the Law Council of Australia

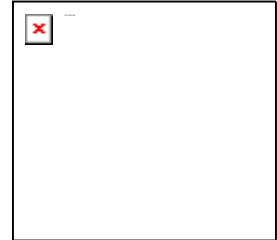
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- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.



Healthcare Identifiers and Privacy

To Department of Health and Ageing

20 August 2009

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Acknowledgment

The Law Council acknowledges the assistance of the Privacy Law Committee of its Business Law Section in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to make a short submission on a Discussion Paper issued by the Department of Health in relation to Healthcare Identifiers and Privacy. In the time available for submissions the Law Council has been unable to address all the issues raised and will therefore limit its comments to:
 - (a) The restricted scope of the Discussion Paper, particularly in the context of previous proposals for national identity cards and the potential for use of identifiers for purposes beyond identification for recording and communication of patient information
 - (b) The need for independent audit or review to address the privacy intrusive nature of the proposals similar to the right of audit for the Office of the Privacy Commissioner in respect of tax file number administration and credit reporting matters
 - (c) The proposals relating to use of Medicare information and use of Government healthcare identifiers by private sector organisations
 - (d) The recommendations by the Australian Law Reform Commission (ALRC) relating to privacy and health information
 - (e) The need to consider the current National Human Rights Consultation
2. The Law Council is the peak body for the Australian legal profession representing around 55,000 legal practitioners through State and Territory Law Societies, Bar Associations and the Large Law Firm Group. Further details of the Law Council's activities are outlined in Attachment A.

Background

The Discussion Paper

3. The paper outlines the benefits of providing access to health information through electronic communication technology known as e-health. The paper notes that inability to share health information efficiently can result in errors such as medication errors, incorrect surgical interventions and diagnostic testing errors.
4. The paper has been developed by a working group from Commonwealth, State and Territory health departments and is said to represent a collection of issues rather than a concluded policy position of governments.
5. Two essential elements for an e-health system are said to be national healthcare identifiers and robust regulatory arrangements for privacy.
6. In 2006 the Council of Australian Governments (COAG) agreed to develop healthcare identifiers to accelerate work on the e-health system. It established the

National E-Health Transition Authority (NEHTA), a company which aims to develop better ways of collecting and exchanging health information electronically.

7. In November 2008, COAG agreed to assignment of Individual Healthcare Identifiers (IHIs) as a universal identifier and requested public consultation on national privacy legislative proposals with a report to be made to COAG in late 2009.
8. A Healthcare Identifiers Service (HIS) is to be established to assign issue and maintain the identifiers. The HIS will hold personal demographic details for identification purposes but will not hold clinical information. The paper proposes that Medicare will be the initial HIS.
9. The paper states that the development and design of the HIS has been subject to an overarching and ongoing Privacy Management Framework and refers to the NEHTA publication, *Approach to Privacy* (July 2006). The Law Council notes that this publication refers to the need for a full Privacy Impact Assessment of e-health proposals, which does not seem to have yet been carried out.¹
10. The Law Council also notes that documents published by NEHTA subsequent to *Approach to Privacy* deal with privacy issues relating to Individual Electronic Health Records.² Such documents provide an important context for the proposals in the Discussion Paper as the proposal for Healthcare Identifiers is a preliminary step to the use of Individual Electronic Healthcare Records.
11. The Discussion Paper also refers to the Australian Law Reform Commission's (ALRC) Report on Privacy Law Reform and suggests changes to some of its recommendations in relation to health privacy.

Previous Law Council submissions on ALRC Privacy Law Proposals which relate to health privacy and identifiers

12. The Law Council made submissions on the ALRC Issues Paper 31 (Feb 2007) and Discussion Paper 72 (Dec 2007) relating to privacy law reform.³
13. The Law Council supported a single set of Unified Privacy Principles (UPPs) applicable to Government agencies and private sector organisations.
14. The Law Council also suggested harmonisation of Commonwealth, State and Territory privacy laws by way of referral of powers to the Commonwealth.
15. The Law Council acknowledged that specific regulation is required to address health privacy but questioned the benefit of industry specific codes against cost and complexity. The Law Council suggested that derogation from the UPPs be reconsidered, particularly in relation to industry specific codes.
16. The Law Council acknowledged that ALRC proposals to restrict the use of unique identifiers were intended to prevent the development in stages of a form of identity

¹ See *Approach to Privacy* July 2006 at www.nehta.gov.au

² See *Blueprint for Privacy for Individual Electronic Health Records*, July 2008 and *Report on Feedback on Privacy Blueprint for Individual Electronic Health Records*, Nov 2008 at www.nehta.gov.au

³ See *Privacy Law Submission to the ALRC*, December 2007 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca and *Submission to ALRC Issues Paper Inquiry into the Commonwealth Privacy Act 1988* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C75AF62-1C23-CACD-22F1-622AEA27C7ED&siteName=lca

card. However the Law Council submitted that a Government agency assigning an identifier should be able to use it for the purpose of identifying an individual.

Previous Law Council representations and submissions in relation to 'Identity Card' Proposals

17. In 1987, the Government introduced *the Australia Card Bill* to enable the issue of an identity card which would:
 - (a) Allow a national register to be maintained by the Health Insurance Commission
 - (b) Feature a unique identification number, name, date of birth, photograph and signature
 - (c) Enable electronic exchange of information by Government agencies for a wide range of purposes including taxation, health and welfare benefits and financial transactions
18. The Law Council opposed the proposal on privacy grounds.⁴
19. In 2005 in the wake of the London terrorist bombings, the Government announced a proposal to introduce an identity card to combat illegal immigration, terrorism and fraud. Reports suggested that such an Identity Card might be implemented in stages beginning with the introduction of a health care card to integrate patient records among health care services.
20. In 2006, the Government publicly ruled out introducing a compulsory identity card and proposed the introduction of a Health and Social Services Access Card. The Department of Human Services issued a Discussion Paper in relation to the proposal, which provided that the card would:
 - (a) Contain a unique photograph, signature and number
 - (b) Need to be used by every person to verify their identity and access government services
 - (c) Replace 17 health and social services cards, including Medicare cards
21. The Law Council made a submission on the proposal which argued that, although a card to streamline access to Government services was not opposed in principle, it considered that the Government had failed to demonstrate that the card was:
 - (a) Necessary and achieved its objectives
 - (b) Not an unwarranted infringement on existing rights to privacy
 - (c) Subject to appropriate accountability mechanisms
 - (d) Not subject to the risk that it become an identity card⁵

⁴ See *Commonwealth Government Proposals for a National Identity Scheme and Australia Card*, March 1986 at www.lawcouncil.asn.au

⁵ See *The Australian Government's Health and Social Services Access Card – Discussion Paper 1*, Sep 2006 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C75293B-1C23-CACD-2214-0214CAA2EE0E&siteName=lca

Features of the Healthcare Identifiers Proposal

22. Three identifiers will be issued:
 - (a) Individual Healthcare Identifier (IHI)
 - (b) Healthcare Provider Identifier – Individual (HPI-I)
 - (c) Healthcare Provider Identifier – Organisation (HPI-O)
23. IHIs and HPI-Is will be Commonwealth assigned unique identifiers.
24. Healthcare Identifiers will be added to a healthcare organisation's patient administration and medical records systems and will facilitate recording and communication of patient information between a patient's healthcare team. They will also be used as the basis for proposals such as Individual Electronic Health Records (IEHRs) but these proposals are said to be outside the scope of the paper.
25. Proposed healthcare identifiers legislation will not mandate the use of healthcare identifiers by individuals or organisations. Individuals will still be able to receive services without an identifier.
26. Healthcare identifiers will not of themselves provide enough information to authorise access to electronic health information systems. NEHTA is designing a National Authentication Service for Health (NASH) to provide a Public Key Infrastructure system for health. NASH will issue digital certificates and tokens to individuals and healthcare providers and provide e-authentication of providers and organisations. Providers and organisation will be able to opt in to a National Healthcare Provider Directory, which will enable searches, communication and information exchange.
27. Although the paper acknowledges that names, passwords and tokens such as passports and cards can be used to identify someone, it asserts that unique identifiers can facilitate more seamless interactions and make it easier to match or link personal information. The paper also acknowledges that such linkages can also facilitate direct marketing and data surveillance.
28. Healthcare identifiers will be 16 digit numbers that comply with International Standards Organisation and Australian standards for healthcare identifiers. It is said that each number will be associated with the minimum amount of personal demographic information to uniquely identify the individual, provider or organisation. They may be used for electronic health records and health information transactions, eg prescriptions, discharge summaries and health test results.
29. Where a healthcare identifier is included with an individual's health information it will be treated as health information and protected by relevant laws.
30. Legislation will set out additional functions for Medicare to:
 - (a) Assign, collect, use and disclose identifiers for healthcare identification, information management and communication (Individual consent will not be sought for assignment of IHIs)
 - (b) Use information from its Consumer Directory Maintenance Service (CDMS) to assign IHIs (where such information is not available, Medicare will collect similar information including name, date of birth and where relevant, birth plurality; birth order and date of death)

(c) Limit disclosure of information

31. The use of existing Medicare numbers as IHIs is said not to be possible because they are not unique, eg family members often use the same number and Medicare numbers are designed for payment of benefits. Some healthcare consumers do not have a Medicare card. Some healthcare providers also do not have a Medicare provider number.
32. The format of Medicare numbers is not intended for use as an identifier in an electronic environment.
33. HPI-Is and HPI-Os will be assigned by trusted data sources such as registration boards under the National Registration and Accreditation Scheme (NRAS), other trusted sources and the HIS.
34. Healthcare identifiers will be associated with healthcare information about individuals and existing privacy laws relating to collection, use and disclosure of health information will continue to apply.
35. These existing privacy laws are currently being reformed pursuant to the Government's response to the ALRC Report. However, these reforms are not expected to be finalised by the time that the HIS is expected to be operational in mid-2010. Therefore the paper makes some suggestions for changes to the existing legislative framework. The paper also addresses the national privacy framework proposed by the ALRC.

Issues relating to Healthcare Identifiers and Privacy

The Law Council wishes to raise issues relating to:

- (a) The restricted scope of the Discussion Paper, particularly in the context of previous proposals for national identity cards and the potential for use of identifiers for purposes beyond identification for recording and communication of patient information
- (b) The need for independent audit or review to address the privacy intrusive nature of the proposals similar to the right of audit for the Privacy Commissioner in respect of tax file number administration and credit reporting matters
- (c) The proposals relating to use of Medicare information and use of Government healthcare identifiers by private sector organisations
- (d) The ALRC Recommendations relating to privacy and health information
- (e) The need to consider the National Human Rights Consultation

The Restricted Scope of the Discussion paper

36. The Law Council accepts that development of an e-health system needs to occur in stages and that NEHTA publications and consultations have dealt with privacy issues in the context of other parts of the e-health system such as Individual Electronic Health Records. However, the Law Council suggests that the broader

context of both the e-health system and other potential uses of IHIs need to be considered in terms of legislative reforms to enable the use of IHIs.

37. Given the history of previous attempts to introduce a national identity card, the Law Council suggests that there needs to be a clear statement of legislative intent that an IHI is to be used for no other purpose than to facilitate electronic recording and communication of patient health information between a patient's healthcare team.
38. The Discussion Paper itself indicates the possible future expansion of the functions of the HIS.⁶ The Law Council believes that any future expansion should only be authorised by further legislation to ensure that such expansion is open to full Parliamentary scrutiny.

The Need for Independent Audit or Review

39. The Discussion Paper notes that there will be a data quality framework and an information security framework to support the HIS, although few details are given of either framework. The paper also notes that the HIS will audit its system log of all transactions and access attempts and that this system log may also be subject to independent audit by relevant Government regulators, although which regulators are not specified. However, the paper does not refer to any need for independent audit or review of the operation of the HIS in relation to privacy issues in a similar way to the right of audit for the Office of the Privacy Commissioner in respect of tax file number administration and credit reporting matters. The Law Council recommends that such a provision be included in the amending legislation or in the *Privacy Act 1988*.
40. While the paper suggests that the Privacy Commissioner will provide independent oversight of the HIS and the handling of healthcare identifiers by private sector healthcare providers, no details are provided of the mechanisms for such oversight.

The proposals relating to use of Medicare information and use of Government healthcare identifiers by private sector organisations

41. The Discussion Paper proposes that Medicare use information from its CDMS to assign IHIs without the consent of the individuals concerned. The Law Council notes that existing Information Privacy Principle (IPP) 10 does not permit the use of information for a purpose other than for which it was collected except in certain circumstances. One of these circumstances is with the consent of the individual. Another of these circumstances is where the use is authorised by law.
42. The Law Council is concerned with the proposal in the paper for the use of existing personal information by Medicare for the purpose of issuing IHIs to be authorised by legislation rather than by consent. The Law Council suggests that consent should be obtained in order to improve the transparency of this process.
43. The Law Council also notes that the existing National Privacy Principle (NPP) 7 provides that private sector organisations should not use Government identifiers. The paper proposes that legislation be introduced to provide that NPP 7 does not apply in relation to the use of IHIs and HPI-Is by private healthcare provider organisations for identification and communication purposes. The Law Council suggests that the legislation contain strict limits on the suspension of NPP 7 to ensure that it does not extend to any other circumstances.

⁶ See *Healthcare Identifiers and Privacy: Discussion Paper on Proposals for Legislative Support*, July 2009 at 37

The ALRC Recommendations relating to Privacy and Health Information

44. The Discussion Paper notes the ALRC's recommendations for privacy law reform, particularly in the area of health privacy. The paper rejects the ALRC recommendations for reform in relation to privacy of health information through the addition of health specific regulations to the general provisions of the Privacy Act and new Uniform Privacy principles (UPPs). The paper notes that Health Ministers have agreed that specific health privacy provisions should be incorporated into the UPPs, although it is unclear how this agreement will interact with the Government's legislative response to the ALRC's reform proposals, which is being developed through the Department of Prime Minister and Cabinet.
45. The Law Council in its submission to the ALRC's Discussion paper also expressed concerns about the addition of subject or industry specific regulations or codes to the general provisions of the Privacy Act and the UPPs.
46. The paper notes that the ALRC suggested harmonisation of Commonwealth, State and Territory privacy laws by way of a co-operative scheme where Commonwealth legislation would regulate the Commonwealth public sector and the private sector with State and Territory legislation regulating the State and Territory public sectors. The Law Council's position is that a referral of powers to the Commonwealth would be preferable to the proposed co-operative scheme, particularly in the context of health privacy as there is a high degree of overlap between the Commonwealth, State and Territory public sectors and the private sector in this area.⁷
47. The paper also suggests that guidelines should be issued by the Privacy Commissioner in relation to a number of UPPs relating to:
 - (a) Collection of identifying health information without consent for purposes including funding, management or evaluation of a health services
 - (b) Key requirements for retaining health information (eg retention periods and obligations where a healthcare service is sold, amalgamated or closed)
 - (c) The process to be followed to gain access to personal information
48. The Law Council supports the issue of guidelines by the Privacy Commissioner in relation to the use of healthcare identifiers.

The Need to Consider the National Human Rights Consultation

49. On 10 December 2008, the Commonwealth Government announced a national consultation on human rights protection in Australia.
50. One of the issues being addressed in the National Consultation is Australia's obligation to protect human rights expressed in international treaties such as the *International Covenant on Civil and Political Rights* (ICCPR). One of the ICCPR rights is the right to privacy.

⁷ See *Privacy Law Submission to the ALRC*, December 2007 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca

-
51. The Law Council has made a submission to the National Consultation supporting the enactment of a statutory Charter of Rights, which would include ICCPR rights.⁸ The Charter supported by the Law Council would bind public authorities such as Medicare to consider human rights such as the right to privacy in decision-making. The Charter would also require that draft legislation be accompanied by a Human Rights Compatibility Statement.
 52. The Law Council notes that the Discussion Paper makes no reference to the National Consultation on Human Rights and suggests that the Department of Health should consider the implications of the consultation and the report of the Consultation Committee, which is due on 30 September 2009 in relation to the right to privacy and the use of healthcare identifiers.

⁸ See A Charter: Protecting the Rights of All Australians, Submission to the National Consultation on Human Rights at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=137C730B-1E4F-17FA-D265-1A8F437F5A94&siteName=lca

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