



**Not yet ready for exposure: response to the  
Exposure Draft Healthcare Identifiers Bill 2010**

**15 January 2010**

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# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based, public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's expertise in privacy, health and human rights

PIAC has a long history of interest in, and concern about, the appropriate protection of privacy rights within both the public and private sectors. PIAC has been a strong advocate for the protection of the privacy rights of Australians, particularly the rights of individual Australians to control their personal information and to be free of excessive intrusions. PIAC's work as a consumer advocacy organisation, particularly in relation to health matters, has required PIAC to consider privacy issues because they are frequently a matter of concern to many people who contact the Centre.

In recent years, PIAC has provided legal advice and assistance to clients in a number of matters involving alleged breaches of the *Privacy and Personal Information Protection Act 1998* (NSW) (the PPIP Act) and the *Privacy Act 1988* (Cth) (the Privacy Act). In 2006, PIAC represented the respondent in *Director General, NSW Department of Education and Training v MT* [2006] NSWCA 270, a landmark case concerning the interpretation of several key provisions of the PPIP Act. In another matter before the Office of the Privacy Commissioner (OPC) PIAC represented a former Villawood detainee whose personal information was inappropriately disclosed to the media.

PIAC has played a leading role in privacy debates in Australia in recent years, contributing to a number of inquiries and reviews at the national and state level. Recent submissions by PIAC have addressed the privacy implications of the proposed Health and Social Services Access Card<sup>1</sup>, and the proposal by the Australian Bureau of Statistics to implement a longitudinal study in the population census (a proposal requiring capacity to data match over time).<sup>2</sup> In October 2007, PIAC made a submission to the first Consultation Paper in the current reference from the New South Wales Law Reform Commission (NSW LRC), *Consultation Paper 1 – Invasion of Privacy*.<sup>3</sup> In December 2007, PIAC made a submission in response to *DP72: Review of Australian Privacy Law*, as part of the reference on privacy being conducted by the Australian Law Reform Commission (ALRC). PIAC also participated in the consultations conducted by and made submissions to the Federal Department of the Prime Minister and Cabinet in relation to amendments to the Privacy Act in relation to the establishment of Unified Privacy Principles and amendments in relation to health information privacy.

PIAC Chief Executive Officer, Robin Banks, is a member of the Privacy Advisory Committee (PAC), which provides strategic advice to the Federal Privacy Commissioner on privacy issues and the protection of personal information.

PIAC has also undertaken a considerable amount of work on patient or health care rights over its 26 years of operation, in particular around patient safety, complaints and investigations processes, health privacy and the development of an Australian Health Consumers' Charter.

PIAC welcomed the endorsement of the Australian Charter of Healthcare Rights by the Australian Health Ministers in July 2008. PIAC participated in the consultation process that led to the Commission's draft charter, including providing a written submission in response to the Consultation Paper on the draft charter.

PIAC also made a submission to the Senate Select Committee on Medicare in 2003.

PIAC has a long-standing interest and expertise in the scope and application of international human rights, including the right to privacy. It has conducted a national 'Protecting Human Rights in Australia' project since 2004 and has made numerous submissions to government and other inquiries in relation to issues that have the potential to interfere with human rights.

## **The current consultation and this submission**

PIAC welcomes the opportunity to provide this submission to the Department of Health and Ageing (DoHA) in response to the release of the Exposure Draft Healthcare Identifiers Bill 2010 (the Exposure Draft Bill). In this submission, PIAC provides brief introductory comments on the context of the Exposure Draft Bill and the current consultation process and then provides detailed comments in relation to the content of the Exposure Draft Bill.

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<sup>1</sup> Public Interest Advocacy Centre, *Health and Social Services Access Card: Submission to Access Card Consumer and Privacy Taskforce, Discussion Paper* (2006); Public Interest Advocacy Centre, *Access Card Proposal Still Fails Public Interest Test: Comment on the Exposure Drafts of the Access Card Legislation* (2007).

<sup>2</sup> Public Interest Advocacy Centre, *Submission to the Australian Bureau of Statistics on Enhancing the Population Census: Developing a Longitudinal View* (2005).

<sup>3</sup> Public Interest Advocacy Centre, *Matching Rights with Remedies: a statutory cause of action for invasion of privacy, Submission to the NSW Law Reform Commission on Consultation Paper 1 – Invasion of Privacy* (2007).

## Timing and conduct of consultation processes

PIAC has previously provided critical comment on the approach being taken by DoHA to the development of healthcare identifiers and raised concerns about the failure to ensure public access to the Privacy Impacts Assessments (PIAs) conducted in relation to the development of a healthcare identifier system.<sup>4</sup> PIAC acknowledges that the PIAs have now been made available through the National E-Health Transition Authority (NEHTA) website. Many of the other concerns raised by PIAC and other consumer advocates (including, for example, the Australian Privacy Foundation) have not been addressed through the release of the Exposure Draft Bill or the background materials.

PIAC is concerned that on top of these failures by DoHA, the Exposure Draft Bill was made available in December 2009 with an invitation for comment by close of business on Thursday 7 January 2010. This meant that consumer and privacy advocates and advocacy groups (most of which are small and under-resourced, often relying on voluntary labour) had less than a month to respond. The impact of this limited time frame was exacerbated by the fact that the Christmas–New Year break fell in the consultation period, effectively wiping out almost two weeks of the month. Most organisations (including PIAC) had, by that stage, a number of other pressing deadlines in the lead up to Christmas and had already approved leave for staff over the Christmas period that seriously impaired their capacity to respond to the Exposure Draft Bill. PIAC contacted staff in the office of the Minister for Health to seek further time and was granted an extension till 15 January 2010. At that time, PIAC noted its serious concerns about the approach being taken to this consultation in terms of timing and the fact that the deadlines involved are self-imposed by DoHA.

## Summary of recommendations

1. PIAC recommends that the Department of Health and Ageing defer further action on the Healthcare Identifiers System until the amendments to the *Privacy Act 1988 (Cth)* in respect of health information privacy are legislated.
2. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove clauses 15(1)(b) and 15(1)(c).
3. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to provide individuals the right to access and seek correction or annotation to their healthcare identifier data held by the service operator from the date of system implementation.
4. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to require data sources and the service operator to keep a record of all disclosures and collection and use of information and healthcare identifiers.
5. PIAC recommends that prior to the tabling of the proposed legislation, consideration be given to requiring individual consent to some or all of the disclosures, uses and collection of both data and healthcare identifiers.

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<sup>4</sup> Letter from Robin Banks, PIAC, to Rosemary Huxtable, Acting Deputy Secretary, DoHA, 13 August 2009.

6. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to make clear the Federal Government's intention in respect of whether or not individual healthcare consumers will be informed of their healthcare identifier.
7. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove the provisions in clauses 5 and 6 that permit matters to be dealt with by way of regulation and as well as sub-clause 24(1)(b).
8. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to include specific obligations on anyone in possession of consumer information or healthcare identifiers to implement and maintain strong information security measures.
9. PIAC recommends that the words 'to use the information for the purposes ...' in subclause (b) of clauses 8(2), 9(2), 11(2), 12(2), 13(2), 14(2) and 15(2) of the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to read:  
    '(b) to use the information;  
    for the purposes ...'
10. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove the crown indemnity in clause 4(2) so as to ensure that if the service operator is an entity of the 'crown' it can be held liable for breaches of the legislation.
11. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to ensure that the service operator can be held jointly and severally liable with other persons for breaches of the legislation where the breach occurred as a result of actions of an employee or agent of the service operator or due to a failure of the information security systems of the service operator.
12. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove clause 10(2)(b).
13. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove clause 17(2)(b) and clause 17(4)(b).
14. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to make it express on the face of clause 17(1) that the offence relates to intentional use or disclosure.
15. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to include the defence set out in clause 17(4)(c) in clause 17(2).
16. PIAC recommends that the Department of Health and Ageing conduct further consultation, particularly with privacy and health consumer advocates and advocacy organisations in relation to prosecutions under the legislation and remedies for individuals where a prosecution for an offence is successful.
17. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove reference to insurance businesses being permitted to use healthcare identifiers for the purpose of provision of healthcare and to extend the definition of 'insurance business' to include superannuation providers.

18. PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to include in clauses 21 and 22 an obligation for the Federal Health Minister to table the annual reports required under those provisions in the Federal Parliament within 15 sitting days of the reports being provided to the Ministerial Council.

## General comments

### The right to privacy and healthcare rights

A key focus in the development of the healthcare identifiers system should be on ensuring proper protection of the healthcare consumers' individual right to privacy. The right to privacy is a fundamental human right that has been recognised as such in key international instruments including the *Universal Declaration of Human Rights*<sup>5</sup> and the *International Covenant on Civil and Political Rights* (ICCPR).<sup>6</sup> Australia is a State Party to the ICCPR and, as such, is obliged to ensure the protection, promotion and fulfilment of the right to privacy.

PIAC also notes that the Australian Health Ministers, in endorsing the Australian Charter of Healthcare Rights, have recognised the right to privacy of healthcare consumers.<sup>7</sup>

While PIAC recognises that privacy is not an absolute right and that it must be balanced against other rights (such as freedom of expression and national security), PIAC is concerned that the Exposure Draft Bill fails to properly recognise and protect the right and adequately deal with infringements of the right.

### The current context

PIAC is concerned that there are two significant Federal Government processes taking place in relation to healthcare and privacy and they do not appear to be working in concert. The two processes are the development of a healthcare identifiers system and the review and amendment of the *Privacy Act 1988* (Cth) (the Privacy Act) in respect of health information.

PIAC urges the Federal Government to ensure that the two processes are brought together and nothing further done in respect of progressing the establishment of the healthcare identifiers system until the amendments to the Privacy Act in respect of health information have been finalised. At that point it will become much clearer what, if any, further privacy protections will be necessary to ensure the proper protection of the right to privacy of healthcare consumers.

### Recommendation

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1. *PIAC recommends that the Department of Health and Ageing defer further action on the Healthcare Identifiers System until the amendments to the Privacy Act 1988 (Cth) in respect of health information privacy are legislated.*

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<sup>5</sup> *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/Res/810 (1948), Art 12.

<sup>6</sup> *International Covenant on Civil and Political Rights*, 16 December 1966 [1980] ATS 23, (entered into force generally on 23 March 1976), Art 17.

<sup>7</sup> *Australian Charter of Healthcare Rights* (2009) Australian Commission on Safety and Quality in Health Care <<http://www.health.gov.au/internet/safety/publishing.nsf/Content/PriorityProgram-01>> at 12 January 2010.

## Legislative purpose

The DoHA's 'Exposure Draft Healthcare Identifiers Bill 2010: Release Note – 10 December 2009' indicates that the:

... purpose of the Bill is to establish a Healthcare Identifiers Service (HI Service) to implement a national system for consistently identifying consumers and healthcare providers and to establish clear purposes for which healthcare identifiers can be used.<sup>8</sup>

This fails, however, to identify what is the public good to be achieved through the establishment of such a HI Service. The document goes on state that:

This represents an important step in improving the management and communication of health information to support the nation's healthcare needs into the future and provides a key foundation for e-health initiatives across Australia.

The HI Service will underpin the development of a national electronic health system by removing those technological and organisational impediments to effective sharing of health information that have resulted from poor patient and provider information.<sup>9</sup>

PIAC understands this to mean that the purpose is to facilitate appropriate transfer of healthcare information to improve healthcare outcomes. This purpose is commendable.

PIAC is, however, concerned that the actual Exposure Draft Bill seems to contemplate broader uses for healthcare identifiers, including 'the management, funding, monitoring or evaluation of healthcare'<sup>10</sup> and the 'conduct of health or medical research ...'<sup>11</sup>

Both of these purposes significantly change the context and scope of the HI Service and raise, for PIAC, serious concerns about the Federal Government's overall purpose in respect of healthcare identifiers. PIAC has previously made extensive submissions about the privacy risks of the former Federal Government's proposed healthcare card, concerns that seemed to be understood and shared by the current Government when in opposition. Yet, the inclusion of 'management, funding, monitoring and evaluation of healthcare' as a purpose for which healthcare identifiers are authorised to be used, suggests that the identifiers could replace Medicare numbers and cards for the purpose of management and funding of the provision healthcare services.

Further, both of the two additional purposes authorised under clause 15 are inconsistent with the use of de-identified data in research. It is not at all clear from the Exposure Draft Bill or supporting documentation why the use of healthcare identifiers is necessary or desirable in respect of either of these two purposes. Indeed, sound research generally relies on de-identified data to protect the integrity of the research.

PIAC considers that the inclusion of this authorisation in clause 15 is a clear example of function creep, where provisions and mechanisms designed specifically for one purpose over time expand to permit other activities. Function creep was identified by PIAC and others in respect of the healthcare card and appears to already be a serious risk of the HI Service as it is developing.

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<sup>8</sup> Department of Health and Ageing, 'Exposure Draft Healthcare Identifiers Bill 2010: Release Note – 10 December 2009' (2009) 1.

<sup>9</sup> Ibid.

<sup>10</sup> Exposure Draft Healthcare Identifiers Bill 2010 (Cth) cl 15(1)(b).

<sup>11</sup> Exposure Draft Healthcare Identifiers Bill 2010 (Cth) cl 15(1)(c).

## Recommendation

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2. PIAC recommends that the *Exposure Draft Healthcare Identifiers Bill 2010 (Cth)* be amended to remove clauses 15(1)(b) and 15(1)(c).

## Consumer rights

There is nothing in the Exposure Draft Bill that provides for the right of the consumer to access and correct information held by the service operator. This is extraordinary given the range of provisions that permit collection, access and disclosure. PIAC supports the submission of the Australian Privacy Foundation that the Exposure Draft Bill should 'mandate provision for consumer access to their own HI data from the date of system implementation'.<sup>12</sup>

There is nothing in the Exposure Draft Bill that requires the service operator to keep a record of each time it makes a disclosure of a healthcare identifier and to whom. This absence needs to be rectified to ensure what disclosures of their healthcare identifier have occurred.

Further, there is nothing in the Exposure Draft Bill that requires data sources to keep a record of what information has been disclosed to the service operator or the service provider to keep a record of what information has been collected and from what data sources. Again, this absence needs to be rectified to ensure consumers have access to this information.

PIAC is concerned that all of the disclosures and uses authorised under the Exposure Draft Bill are without any requirement to obtain the consent of the individual. Further consideration needs to be given to whether some or all of the disclosures and uses both of data and of healthcare identifiers could and should require the consent of the individual consumer.

One other aspect of the Exposure Draft Bill that is unclear is whether or not a consumer will have knowledge of their healthcare identifier. There is currently nothing in the legislation that permits disclosure of a healthcare identifier to the individual consumer. The explanatory paper published by the Australian Health Ministers' Conference in November 2009, *Building the foundation for an e-health future ... update on legislative proposals for healthcare identifiers*<sup>13</sup> (the Background Paper), is inconsistent in relation to this question. On one hand, the Background Paper states that 'Individual Healthcare Identifiers (IHI) will be provided to all individuals who receive healthcare in Australia'.<sup>14</sup> This can, quite appropriately, be understood to mean that the identifier will be disclosed to the individual. In the alternative, it could be understood to mean that an identifier will be allocated to the individual. Further on, the document states that 'Individual Healthcare Identifiers will only be provided by the HI Service to "authorised" users'<sup>15</sup> where 'authorised users' are defined as 'Healthcare providers who have HPI-Is [and] individuals authorised to access the HI Service on behalf of an HPI O ...'<sup>16</sup> This seems to preclude disclosure of the identifier to the individual consumer.

This situation is further muddled by the fact that clause 17(4)(c) seems to contemplate a situation where the individual is aware of their healthcare identifier and discloses it.

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<sup>12</sup> Australian Privacy Foundation, *Re: the exposure draft Healthcare Identifiers Bill 2010* (2010) [3].

<sup>13</sup> Australian Health Ministers' Conference, *Building the foundation for an e-health future ... update on legislative proposals for healthcare identifiers* (2009).

<sup>14</sup> *Ibid* 13.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid* 20.

## Recommendations

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3. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to provide individuals the right to access and seek correction or annotation to their healthcare identifier data held by the service operator from the date of system implementation.*
4. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to require data sources and the service operator to keep a record of all disclosures and collection and use of information and healthcare identifiers.*
5. *PIAC recommends that prior to the tabling of the proposed legislation, consideration be given to requiring individual consent to some or all of the disclosures, uses and collection of both data and healthcare identifiers.*
6. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to make clear the Federal Government's intention in respect of whether or not individual healthcare consumers will be informed of their healthcare identifier.*

## Lack of certainty and delegation of significant power to regulations

PIAC shares the concern expressed by others about the number of aspects of the proposed HI Service that are dealt with in the Exposure Draft Bill through empowering regulations to be made.<sup>17</sup> Provisions operating in this way include the following:

- Clause 5 – Definitions in respect of the definition of 'data source' and 'service operator'. This effectively permits new service operators, either public or private, to be introduced through regulation rather than being subject to the full scrutiny of the legislature, and for the data used by the service operator(s) for 'purposes of the service operator assigning a healthcare identifier' to be sourced from currently unknown and unidentified sources again without the full scrutiny of the appropriateness of such sourcing by the legislature. Again, as with potential future service operators, the data sources permitted through regulation could be private sources.
- Clause 6 – requirements for assignment of healthcare identifiers. Central to the proper protection of personal information in a scheme of this sort are clear and mandatory requirements for operation of the scheme. Yet, the Exposure Draft Bill provides that 'regulations may prescribe requirements for assigning a healthcare identifier'.<sup>18</sup> Such a core element of the HI Service should properly be clear on the face of the primary legislation and should be dealt with at the time the HI Service is established not at some later time. Under the Exposure Draft Bill it would be possible for the HI Service to be implemented and operational without any requirements prescribed in respect of the assignment of healthcare identifiers.

In addition to these two explicit provisions referring core matters to subordinate legislation, the broader regulation-making power contained in clause 24 of the Exposure Draft Bill permits regulations to be made prescribing matters 'necessary or convenient to be prescribed for carrying out or giving effect to this Act'. This is an extraordinarily permissive provision.

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<sup>17</sup> See, for example, Australian Privacy Foundation, above n 12, [10]; Law Council of Australia, *Healthcare Identifiers and Privacy* (2010) 10.

<sup>18</sup> Exposure Draft Healthcare Identifiers Bill 2010 (Cth) cl 6(3).

The reliance by DoHA on referral to regulation of such core aspects of the HI Service strongly indicates that the Exposure Draft Bill is premature, with significant further work required to ensure proper consideration has been given to governance aspects and the scope of the HI Service.

### **Recommendation**

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7. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove the provisions in clauses 5 and 6 that permit matters to be dealt with by way of regulation and as well as sub-clause 24(1)(b).*

### **Absence of the consumer in establishment of healthcare identifier**

There is nothing in the Exposure Draft Bill that contemplates the individual consumer providing identifying information to permit the establishment of a healthcare identifier. Under the current permitted data sources, healthcare identifiers will only be able to be established for individuals with a Medicare record or a record with the 'Department administered by the Department administering the *Veterans' Entitlements Act 1986*'. This excludes a significant number of individuals within Australia.

If the HI Service is designed to improve healthcare through the better flow of information about healthcare, excluding other individuals from applying and providing identifying information seems extraordinary. It also seems to enable the whole HI Service to be established without the knowledge of consumers. This is an extremely poor public policy approach particularly in light of the previous strong concerns held by consumers about the establishment of national identifier systems.

### **Lack of express security obligations**

PIAC is concerned that there is nothing in the Exposure Draft Bill that expressly deals with obligations on either the service operator or healthcare providers in receipt of individual healthcare identifiers to have in place strong information security measures. This is a gap that must be rectified before tabling.

### **Recommendation**

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8. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to include specific obligations on anyone in possession of consumer information or healthcare identifiers to implement and maintain strong information security measures.*

## **Comments on specific provisions of the Exposure Draft Bill**

### **'Identifying information': clauses 5 and 8**

PIAC urges the DoHA to consider significantly reducing the scope of 'identifying information' within the definition in clause 5 that is permitted under clause 8 to be disclosed by a data source and/or collected by the service operator for the establishment of a unique identity. For example, it is not clear how collecting information on the birth order of a person who is a twin or triplet would be necessary to identify the person, as it is highly unlikely that more than one of the children within a multiple birth would have the same name.

### **The purpose of collection**

Clauses 8(2), 9(2), 11(2), 12(2), 13(2), 14(2) and 15(2) of the Exposure Draft Bill are all drafted in such a way as to technically permit collection of information and/or healthcare identifiers for any purpose as the purpose aspect

of these subclauses is included in subclause (b) of each which relates only to 'use' on the current drafting. This appears to be a drafting error and needs to be rectified.

### **Recommendation**

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9. *PIAC recommends that the words 'to use the information for the purposes ...' in subclause (b) of clauses 8(2), 9(2), 11(2), 12(2), 13(2), 14(2) and 15(2) of the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to read:*

*'(b) to use the information;  
for the purposes ...'*

### **Duty of confidentiality**

PIAC is concerned about several aspects of the provision dealing with the service operator's duty of confidentiality. Firstly, the offence provision in clause 10(1) applies only to a person who received information under Part 2 and then uses or discloses that information for a purpose other than a purpose provided for under clause 10(2). The provision does not deal with a person who has obtained information through unauthorised accessing of the service operator's data system through, for example, computer hacking.

It is also unclear whether or not the service operator can be 'a person' held liable under clause 10. Certainly, while Medicare is the service operator, the effect of clause 4(2) of the Exposure Draft Bill seems to be that the service operator could not be held liable. This is a completely inappropriate limit on liability.

The legislative scheme should ensure that the service operator can and will be held either directly liable for unauthorised disclosure of information or vicariously liable for unauthorised access to information by third parties or disclosure of information by its employees or agents. The provision providing for vicarious liability should, at minimum, be a provision that deems the service operator vicariously liable unless it can establish that it had significant security systems in place to avoid unauthorised access or disclosure and extensive training for employees and agents in respect of these obligations not to disclose any information.

Further PIAC is concerned about the scope of the exemption in clause 10(2)(b) as there is no limit on laws that could authorise disclosure. PIAC notes that the term 'law' is defined in clause 5 to include not only Commonwealth Acts and legislative instruments, but also the Acts and legislative instruments of all of the States and Territories.

### **Recommendations**

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10. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove the crown indemnity in clause 4(2) so as to ensure that if the service operator is an entity of the 'crown' it can be held liable for breaches of the legislation.*
11. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to ensure that the service operator can be held jointly and severally liable with other persons for breaches of the legislation where the breach occurred as a result of actions of an employee or agent of the service operator or due to a failure of the information security systems of the service operator.*
12. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove clause 10(2)(b).*

## Disclosure of healthcare identifiers

There are provisions that provide for authorised disclosure of consumer healthcare identifiers:

- Clause 11(1) authorises the service operator to disclose a healthcare identifier to a healthcare provider; and
- Clause 15(1) authorises a healthcare provider to disclose a healthcare identifier to 'an entity'.

As noted above, there is nothing that provides for authorised disclosure of a healthcare identifier to the individual healthcare consumer. This needs to be clarified.

In addition, PIAC considers that the term 'entity' in clause 15(1) is unduly broad and would permit disclosure to any person or organisation. Partnered with additional purposes set out in clauses 15(1)(b) and 15(1)(c), there is little limiting the potential recipients of healthcare identifiers.

PIAC refers the DoHA to its recommendations 2 and 6 above.

## Liability for disclosure of healthcare identifiers

Clause 17 provides for offences in respect of use or disclosure of healthcare identifiers for purposes other than for the purposes authorised under the Act<sup>19</sup> or 'for a purpose that is authorised under another law'.<sup>20</sup> As noted above under 'Duty of confidentiality', the latter exception is unduly broad and should be removed.

On reading the Exposure Draft Bill alone it is not at all clear what is the distinction between the offence in clause 17(1) and the offence in clause 17(3). Both are in precisely the same words but carry different penalties. It is only on reading the Background Paper that it becomes apparent that clause 17(1) is to apply to intentional use or disclosure of a healthcare identifier that is not permitted by clause 17(2).<sup>21</sup>

In addition, the current drafting of clause 17(2) does not provide individual consumers with a defence to prosecution for the more serious offence, while clause 17(4) does. This may be an oversight or may reflect a view that this is somehow implied by the legislation. Neither is satisfactory.

## Recommendations

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13. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove clause 17(2)(b) and clause 17(4)(b).*
14. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to make it express on the face of clause 17(1) that the offence relates to intentional use or disclosure.*
15. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to include the defence set out in clause 17(4)(c) in clause 17(2).*

## Prosecution of offences

PIAC is concerned that breaches of the legislation are unlikely to be prosecuted unless there is a specific prosecuting authority and/or individuals are able to bring private prosecutions for breaches. A strong message needs to be sent that such breaches are extremely serious and will be acted on. PIAC holds this concern based

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<sup>19</sup> Exposure Draft Healthcare Identifiers Bill 2010 (Cth) cl 17(2)(a) and 17(4)(a).

<sup>20</sup> Exposure Draft Healthcare Identifiers Bill 2010 (Cth) cl 17(2)(b) and 17(4)(b), noting the addition of the word 'only' to qualify the clause.

<sup>21</sup> Australian Health Ministers' Conference, above n13, 30.

on its experience in the area of anti-discrimination law where there are offences specified in various of the federal anti-discrimination statutes, the oldest of which came into effect in the 1970s. As far as PIAC is aware there has never been a prosecution of an offence under any of these statutes. It is PIAC's understanding that such prosecutions, as with prosecutions under the Exposure Draft Bill in its current form, would have to be pursued by the Federal Director of Public Prosecutions.

While clause 18 provides that an offence under the legislation 'is an act or practice involving interference with the privacy of an individual for the purposes of section 13 of the Privacy Act' this is not enough. Without an accessible and targeted prosecuting body, the burden of dealing with breaches of the Act is likely to fall on the individual affected by the breach with their only option being to bring a complaint under the Privacy Act.

Consideration should be given to strengthening and clarifying the process for prosecution of offences and to linking a successful prosecution with a positive finding of breach of the Privacy Act in favour of an affected individual, enabling a remedy to flow to the individual.

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### **Recommendation**

16. *PIAC recommends that the Department of Health and Ageing conduct further consultation, particularly with privacy and health consumer advocates and advocacy organisations in relation to prosecutions under the legislation and remedies for individuals where a prosecution for an offence is successful.*

## **Prohibition on use for insurance or employment**

PIAC is concerned that clause 16 permits use by an insurer of individual healthcare identifiers for the 'purposes of providing healthcare'. As noted above, this appears to expand the function of the healthcare identifiers beyond the purpose stated to broader and unrelated purposes. Such function creep is to be avoided if the integrity of the legislative scheme and purpose is to be maintained.

In addition, the prohibition should extend to superannuation providers as effectively another form of insurance that is not expressly dealt with under clause 16(2).

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### **Recommendation**

17. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to remove reference to insurance businesses being permitted to use healthcare identifiers for the purpose of provision of healthcare and to extend the definition of 'insurance business' to include superannuation providers.*

## **Publication of annual reports**

PIAC commends Department of Health and Ageing (DoHA) on including obligations on both the service operator and the Privacy Commissioner to prepare annual reports in respect of the operation of the legislation. However, there is no obligation for such reports to become public and this is a serious failing of public accountability. It is not sufficient to rely on the publication of the report of the review of the legislation required under clause 23.

## **Recommendation**

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18. *PIAC recommends that the Exposure Draft Healthcare Identifiers Bill 2010 (Cth) be amended to include in clauses 21 and 22 an obligation for the Federal Health Minister to table the annual reports required under those provisions in the Federal Parliament within 15 sitting days of the reports being provided to the Ministerial Council.*