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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

NATIONAL HEALTH AMENDMENT BILL 1993

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Health, Senator
the Hon. Graham Richardson)



OUTLINE

The purpose of this Bill is to repeal and replace section 135AA of the National Health Act 1953, and for consequential changes to section 135AB of that Act and to sections 13 and 27 of the Privacy Act 1988, to clarify doubts concerning the interpretation of the existing provision identified by the Privacy Commissioner in his report to Parliament dated 28 May 1992.

The difficulties that section 135AA presents for the administration of the Medicare Scheme and Pharmaceutical Benefits Scheme were also identified by the Privacy Commissioner in his report to Parliament of 28 May 1992. The Privacy Commissioner concluded that he did not propose to issue Guidelines under the existing provision in the light of advice that the Government intended to bring forward an amendment Bill to clarify the various doubts which have been identified.

This Bill seeks to overcome the difficulties in the existing section 135AA by restricting the scope of the Guidelines to information held in patient claims records under both schemes. Provider, prescriber and pharmacist information is adequately covered by existing secrecy provisions. Section 135A of the National Health Act 1953 and section 130 of the Health Insurance Act 1973 require officers to observe secrecy in respect of information obtained in the course of their duties under both of these Acts and specify criminal sanctions for a breach of these provisions. In addition the Privacy Act 1988 also applies to safeguard this information.

The Bill restricts the scope of the proposed Guidelines to information held in databases, since it is not practical to cover information held on paper files (e.g. to remove from files containing Ministerial correspondence the details of the patient who wrote the letter) and the concerns relating to the use of information held on large databases are more urgent. However, the Bill does require that the Guidelines to be issued by the Privacy Commissioner specify the circumstances in which creating copies of information in paper form are prohibited. The Bill specifies the proposed content of the Privacy Guidelines, that the Privacy Commissioner must consult relevant organisations (including agencies) whose interests are affected by the Guidelines, that the Guidelines are subject to disallowance by the Parliament, the timing of effect of the Guidelines and the consequences of the failure to issue Guidelines.

The Bill also amends section 135AB of the Principal Act concerning breaches of the Privacy Guidelines, with consequential changes to sections 13 and 27 of the Privacy Act.

Financial Impact Statement

There are no financial implications resulting from this Bill.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short Title

This is a formal provision that specifies the short title of the Act as the National Health Amendment Act 1993.

Clause 2 - Commencement

This clause provides that the provisions of the Act will commence on the day on which the Act receives Royal Assent.

PART 2 - AMENDMENTS TO THE NATIONAL HEALTH ACT 1953

Clause 3 - Principal Act

This is a formal provision identifying the National Health Act 1953 as the Principal Act referred to in this Part.

Clause 4 -Repeal of section and substitution of new section

Subclause 4(1) provides for the repeal of section 135AA of the Principal Act and that the new section 135AA be substituted.

New section 135AA - Privacy guidelines

New subsection 135AA(1) - Information to which this section applies

New subsection 135AA(1) defines that, subject to new subsection 135AA(2), the new section 135AA applies to information relating to an individual that is held by any Commonwealth agency (whether or not that information was obtained by that agency or any other agency after the commencement of this section), and that was obtained by that agency, or any other agency, in connection with claims for benefits under the Medicare Benefits Program or the Pharmaceutical Benefits Program.

New subsection 135AA(2) - Information to which this section does not apply

New subsection 135AA(2) specifies that the new section 135AA does not apply to information about persons who provided services or goods, or who referred or requested another person to provide services or goods, in respect of which benefits were payable. This provision also specifies that

the new section does not apply to information held in databases about persons who are eligible for benefits (e.g. the Medicare Enrolment file which contains basic information about who is an Australian Resident, etc.).

The new subsection 135AA(2) also indicates that only information held in a database is covered by the provisions. This is intended to avoid the practical difficulties in relation to information held in paper files and the removal of specific names etc. from Commonwealth documents (e.g. Ministerial correspondence, complaints, etc.). However, new paragraph 135AA(5)(a) does provide that Guidelines to be formulated by the Privacy Commissioner are to specify the circumstances in which creating copies of information in paper or similar form are prohibited (e.g. to prevent any large-scale copying on to paper or some other form that is capable of being reproduced that would have the effect of circumventing the operation of this provision).

New subsection 135AA(3) - Issuing guidelines

This subsection specifies that the Privacy Commissioner must, by written notice, issue guidelines relating to information to which new section 135AA applies.

New subsection 135AA(4) - Replacing or varying guidelines

This subsection enables the Privacy Commissioner to issue by written notice, further guidelines that vary the existing guidelines.

New subsection 135AA(5) - Content of guidelines

This subsection specifies the content of the guidelines. In particular, it states that the guidelines to be made by the Privacy Commissioner must specify:

- (a) the ways in which information may be stored, and in particular, the circumstances in which creating paper copies of information are prohibited;
- (b) the uses to which agencies may put information;
- (c) the circumstances in which agencies may disclose information;
- (d) that agencies are prohibited from storing in the same database information that was obtained under the Medicare and Pharmaceutical Benefits Programs;
- (e) that agencies are prohibited from linking information stored for the purposes of the Medicare and

Pharmaceutical Benefits Programs, unless linkage across the programs is specifically authorised by the guidelines; and

- (f) that patient claims records that are more than 5 years old:
 - (i) must be stored with the personal identification components removed;
 - (ii) may be retained for longer term retrieval;
 - (iii) may be re-identified subject to the circumstances and the conditions specified in the guidelines.

New subsection 135AA(6) - Consultation

This subsection specifies that the Privacy Commissioner must take reasonable steps to consult with organisations (including agencies) whose interests are affected by the guidelines. It is envisaged that the lengthy consultations which have already taken place under the existing provisions will be used by the privacy Commissioner as the basis of the proposed guidelines.

New subsection 135AA(7) - Disallowance

This specifies that the guidelines are disallowable instruments for the purposes of Section 46A of the Acts Interpretation Act 1901.

New subsection 135AA(8) - When guidelines take effect

This specifies that notwithstanding the provisions of the Acts Interpretation Act 1901, the guidelines take effect from the first day that they are liable to be disallowed, or if the guidelines provide for their commencement after that day, in accordance with that provision.

New subsection 135AA(9) - Failure to table guidelines within 6 months

This specifies that if the guidelines are not laid before each House of the Parliament within 6 months of the commencement of this section, the Privacy Commissioner must report the failure to issue guidelines to each House of Parliament within 15 sitting days.

New subsection 135AA(10) - Tabling guidelines after 6 months

This provides that if guidelines are not issued within 6 months, any subsequent guidelines will nevertheless be valid.

New subsection 135AA(11) - Definitions

This defines 'agency', 'database', 'Medicare Benefits Program', 'old information', 'personal information components' and 'Pharmaceutical Benefits Program' for the purposes of the new section 135AA.

The definition of 'old information' retains the 5 year period specified in the original section 135AA.

Subclause 4(2) provides that consultations undertaken by the Privacy Commissioner in preparing the proposed guidelines under the existing section 135AA are taken to be consultations for the purposes of the new section 135AA. This is to prevent the unnecessary duplication of resources by the Privacy Commissioner to repeat the consultations which have already taken place.

Clause 5 - Breaches of the privacy guidelines

This provision amends the Principal Act by omitting subsection 135AB(3) and inserting a new subsection 135AB(3). This new subsection makes it clear that a complaint in respect of a breach of the proposed guidelines to be formulated by the Privacy Commissioner will be regarded as a complaint under the Privacy Act 1988 thereby enabling the Privacy Commissioner to exercise the powers available under that Act to handle such complaints.

PART 3 - AMENDMENTS TO THE PRIVACY ACT 1988

Clause 6 - Principal Act

This clause is a formal provision identifying the Privacy Act 1988 as the Principal Act referred to in this Part.

Clause 7 - Interferences with privacy

This clause amends section 13 of the Principal Act to ensure that the Privacy Act 1988 is consistent with section 135AB of the National Health Act 1953. Section 135AB of the National Health Act 1953 provides that a breach of the Guidelines issued under section 135AA is an "interference with privacy for the purposes of section 13 of the Privacy Act". Section 13, which contains a list of the acts or practices which

constitute an "interference with privacy" will be brought up to date by including a reference to breaches of the Guidelines to be issued under section 135AA of the National Health Act 1953. This is a consequential amendment to reflect this new role for the Privacy Commissioner.

Clause 8 - Functions of Commissioner in relation to interferences with privacy

This clause amends section 27 of the Principal Act to ensure that the Privacy Act 1988 is consistent with section 135AA of the National Health Act 1953. Section 27, which contains a list of the Privacy Commissioner's functions, does not refer to the Privacy Commissioner's power to issue Guidelines under that section of the National Health Act 1953. This amendment will ensure that the two provisions are consistent, and ensure that persons referring to section 27 of the Privacy Act can be confident that all the Privacy Commissioner's powers to issue guidelines are listed there. It is thus a provision to mirror the existing provision in the National Health Act 1953, and therefore consequential to that provision.