10/67

Ms Liz Foreman
Assistant Secretary
eHealth Branch
MDP1003
Department of Health and Ageing
GPO Box 9848
CANBERRA ACT 2601

Dear Ms Foreman

Draft Regulations for the Healthcare Identifiers Service

Thank you for the opportunity to comment on the proposed regulations to support the operation of the Healthcare Identifiers Service.

The AMA appreciates the regulations have been drafted to establish appropriate security and access requirements to give the community confidence that there will be sufficient protections around access to and disclosure of healthcare identifiers by the Healthcare Identifiers Service.

However, the regulations impose a significant amount of red tape on medical practices and other healthcare organisations, and very little obligation on the Healthcare Identifiers Service.

We are concerned that any additional (and unnecessary) administrative burden on medical practices will detract from the delivery of healthcare to patients. The regulatory burden must be kept to a minimum if medical practices are to use healthcare identifiers as part of routine practice.

Further, there are eight penalties for medical practices in the nine pages of draft regulations. This is likely to be a significant deterrent to medical practices using healthcare identifiers.

We make a number of observations about the requirements being imposed on medical practices and suggest alternatives for handling the particular issues that the draft provisions seek to address (as we understand them).

Regulation 6 - Class of healthcare providers – organisations
Subregulation 6(1)(b) provides for only 1 employee, ***a responsible officer***, to act on behalf of a healthcare provider organisation (HPO) in its dealings with the Healthcare Identifiers Service operator (the service operator). The draft regulations and the accompanying *Consultation Paper March 2010* do not elaborate on the nature of the *dealings*.

Subregulation (1)(c) provides for an employee, an ***organisation maintenance officer***, to provide information about the HPO to the service operator. A note in the draft regulation says that there can be more than one organisation maintenance officer.

It is not clear why there is a separation of roles. We would assume that dealing with the service operator would include providing information about the HPO to the service operator.

We note that clause 17 of the *Healthcare Identifiers Bill 2010* (the Bill) requires identified heathcare providers to notify the service operator which employees are authorised to act on their behalf to obtain healthcare identifiers from the service operator.

Together, draft regulation 6 and clause 17 of the Bill require a medical practice to:

1. nominate only 1 employee to *deal* with the service operator;
2. nominate employees to provide information about the practice to the service provider; and
3. notify the service provider about which employees are authorised to act on behalf of the practice to obtain healthcare identifiers of patients.

We recommend the regulations permit HPO to nominate more than one employee who can deal with the service operator. We also recommend that there be a clear list of the anticipated interactions between HPOs and the service operator, beyond obtaining healthcare identifiers for patients and ensuring the details that the service operator has about the HPO are current.

We would like confirmation that under clause 17 of the Bill HPOs can authorise more than one employee to obtain healthcare identifiers from the service operator. It will be impractical for medical practices to have only one employee who can perform this role. Busy medical practices, who often employ staff who work part time, will need to have more than one employee who can obtain patient healthcare identifiers from the service operator.

Subregulation 6(2) appears to be superfluous for two reasons:

1. While a medical practice may have only one practising medical practitioner, he or she will usually employ administrative staff and a healthcare practitioner such as a practice nurse. We believe this would render the medical practice a health care provider organisation; and
2. It effectively defines a sole practitioner as a healthcare provider organisation.

We recommend that subregulation 6(2) be deleted because the reference to a sole practitioner is confusing, but also unnecessary.

Regulation 7 – Information that may be requested before assigning healthcare identifiers

Regulation 7 permits a national registration authority (a NRA) to ask an individual healthcare provider to provide identifying information about him or herself before the NRA assigns the provider a healthcare identifier.

Section 77 of the *Health Practitioner Regulation National Law Act 2009* (the National Law) already provides for applications for registration with a NRA to be accompanied by proof of the applicant's identity. Given the identifying information required under the National Law is sufficient for registration to practice, there is no need for a NRA to ask for more identifying information from a registrant in order to issue him or her with a healthcare identifier. The issuing of a healthcare identifier to a health practitioner registered under the National Law should be automatic.

We are also concerned that subregulation 7(4) provides an opportunity for NRAs to obtain additional information from registrants beyond what is available to them under the National Law.

We recommend the words "national registration authority" should be deleted altogether from regulation 7.

Regulation 9 – Information that may be requested after assigning healthcare identifiers

Firstly, the heading is misleading. This regulation places requirements on individual healthcare providers and HPOs and there are penalties if there is non compliance.

This is a difficult regulation to follow. We have assumed it requires individual healthcare providers and persons associated with an HPO (in the manner described in subregulation 9(1)(a)) to notify the service operator when there is any change in their circumstances that would mean they no longer meet regulation 5 or 6.

In respect of individual medical practitioners, we have read subregulation 9(2) as requiring a registered medical practitioner to notify the service operator when they are no longer registered to practice. There is a substantial penalty if the individual fails to notify the service operator within 14 days of becoming aware he or she is no longer registered.

Given the NRA that assigns the healthcare identifier to the practitioner will be the first to know that the practitioner is no longer registered as they are the determining body, the NRA – not the practitioner – should be obliged to notify the service provider. We assume that there will be good communication channels between the service operator and NRAs, so notification by the NRA should be a simple administrative process.

We recommend that regulation 9 be amended to require the NRA to notify the service provider that a registrant is no longer registered. The obligations on individual healthcare providers (whose registration is covered by the National Law) to notify the service operator should be removed.

Regulation 9 should also be amended to require the service operator to notify the individual practitioner that it has received the notice from the NRA and that the healthcare identifier for that person will no longer operational (if that is what will happen under these circumstances). However, there should be a sufficient period before this occurs to allow the healthcare provider to contact the NRA in the unlikely, but possible, event the NRA has made a mistake.

In respect of subregulations 9 (2), (3) and (4), the AMA understands the desire of Government to ensure the service operator knows every detail about individual healthcare providers and HPOs. However, according to the draft regulations a healthcare provider (or HPO) will incur a penalty of $5,500 if he or she (or it) fails to notify the service operator of a change in email address within 14 days. This is completely unreasonable, and arguably unprecedented.

We recommend that the regulation 9 be amended to require an HPO to notify the service operator if it ceases operation within 14 days. This should be the only action that attracts a penalty if the HPO fails to notify the service operator.

Beyond that, we recommend there be some triaging of the ***identifying information*** (which is listed in clause 7 of the Bill and draft regulation 8) that the service operator needs to be contemporaneously updated on, and the less necessary information that the service operator needs to know, but can be updated on a six monthly or annual basis.

It is better that medical practices be encouraged, and for it to be easy, to maintain their details with the service operator rather than imposing sanctions that will probably discourage them from using healthcare identifiers at all.

Regulation 10 – Rules about the disclosure of healthcare identifiers by the service operator

This heading is also misleading. There are no rules for the service operator in regulation 10. Instead this regulation imposes substantial red tape on medical practices. It appears to impose a number of unreasonable and unnecessary penalties on medical practices if they fail to prevent a person, who is not permitted by the legislation, from making a request to the service operator.

Who can make a request

We note that clause 17 of the Bill requires healthcare providers to notify the service operator of the employees who are authorised to act on behalf of the healthcare provider to obtain patient healthcare identifiers.

Subregulation 10(1)(b) refers to a person making a request as having "duties" in relation to the provision of healthcare. Subregulations 10(6) and (7) also refer to "a person". We are unsure if the person mentioned in these subregulations is a person authorised under clause 17 of the Bill, or the ***responsible officer*** referred to in subregulation 6(1)(b) or the ***organisation maintenance officer*** referred to in subregulation 6(1)(c).

A more practical and simple approach would be for the service operator not to disclose a healthcare identifier to any person who it does not have recorded as an authorised employee under clause 17 of the Bill. This will only work if changes we have recommended are made to the previous regulations to allow more than one employee to act on behalf of the HPO.

We recommend regulation 10 be rewritten so that it is clear who can make a request. This would make it easier for medical practices to understand their obligations about which of their staff should have the various responsibilities under the Healthcare Identifiers legislation.

If it is clear who can make a request, and the service operator does not allocate healthcare identifiers to people who are not authorised to make a request, there is no need for penalties for requests made by people who are not permitted to do so.

Maintaining records of authorised persons
Subregulation 10(8)(a) requires an HPO to maintain records of the employees it has authorised (under clause 17 of the Bill) to access healthcare identifiers from the service operator, and to keep the records for 7 years.

Medical practices retain their employee records for business and taxation purposes. We do not see the need for this specific provision requiring medical practices to "maintain a retrievable record of each person the provider has authorised to access healthcare identifiers from the service operator", particularly given the service operator will have a record of the authorised people under clause 17 of the Bill.

It is unnecessary to impose this additional red tape on medical practices or for it to attract a penalty.

Disclosure of information to unauthorised persons
Subregulation 10(8)(b) requires an HPO to ensure information it receives from the service operator is not disclosed to unauthorised persons.

The AMA has previously sought and received an assurance from the Department of Health and Ageing that a medical practitioner would not be penalised if he or she disclosed a patient healthcare identifier when providing patient records to a range of entities in a variety of circumstances, beyond the transfer of patient information directly between other healthcare providers.

We are concerned that because subregulation 10(8)(b) imposes a penalty for disclosing information to unauthorised persons, it now reopens this original question. We seek urgent clarification on this matter.

Further, given that clause 26 of the Bill already provides for unauthorised use and disclosure of healthcare identifiers, we question the need for this subregulation at all.

Details of the responsible officer and organisation maintenance officer
Subregulation 10(8)(c) requires a HPO to ensure that the service operator always has up to date details of the ***responsible officer*** and ***organisation maintenance officer***. Again there is a penalty if the HPO fails to do so.

Given that not having a ***responsible officer*** and ***organisation maintenance officer*** would remove a HPO from a class of healthcare provider (as per subregulation 9(2)(a) – which contains its own penalty provision), there is sufficient incentive to provide this information to the service operator as a matter of course. There is no need to impose the additional requirement as per subregulation 10(8)(c) and we recommend it be deleted.

As previously stated, it is better that medical practices be encouraged, and for it to be easy, to maintain their details with the service operator rather than imposing sanctions that will probably discourage them from using healthcare identifiers at all. We recommend the service operator develop a non-punitive administrative system that allows medical practices to easily update their details with the service provider.

Awareness of obligations

Finally, subregulation 10(8(d) requires HPOs to ensure their staff are aware of their obligations under the Act and these Regulations, and imposes a penalty if it fails to do so.

The AMA has reviewed the obligations on agencies and their staff in the *Privacy Act 1988* in respect of tax file number information. We see that this is dealt with by guidelines, which includes guidance on making staff aware of the penalties relating to unauthorised acts and practices in relation to tax file number information. We have not been able to identify a specific offence provision in the Privacy Act on this issue.

We believe the offence provisions for unauthorised use and disclosure of healthcare identifiers should be sufficient deterrent, and that medical practices will have a vested interest in ensuring their staff are aware of these provisions. It is unnecessary to threaten medical practices with an extra penalty.

Regulation 11 – Information that may be requested after disclosure of healthcare identifiers

This regulation requires healthcare providers to provide, upon request, information to the service operator about the people who have accessed healthcare identifiers from the service operator. This is unnecessary red tape for medical practices.

Clause 10 of the Bill already requires the service operator to maintain a record of the details of requests made to the service operator for disclosure of healthcare identifiers.

We recommend this regulation be deleted.

Conclusion

The regulations impose a vast amount of red tape on medical practices. Further, there are no rights of administrative review if penalties are imposed on medical practices.

We have made constructive suggestions to ensure that there is sufficient interaction between medical practices and the service operator.

There must be an appropriate balance between guarding against the misuse of healthcare identifiers and minimising the red tape on medical practices that want to adopt the use of healthcare identifiers as a routine part of their practice. We believe that clause 26 of the Bill adequately provides for unauthorised use and disclosure of healthcare identifiers, and that many of these draft regulations are unnecessary.

Yours sincerely

Francis Sullivan
Secretary General

April 2010

fs:bh