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Hongxia Jin
Assistant Secretary
Compliance Audit and Education Branch
Business Integrity and Digital Health Division
Department of Health

Email: Leanne.mckaskill@health.gov.au

Dear Assistant Secretary Hongxia Jin,

Re Review of “relevant professional body” declaration under the Health Insurance Act 1973

On behalf of the Royal Australasian College of Surgeons (RACS) we appreciate the opportunity to respond to the Review, and accept RACS to remain listed as a “relevant professional body” as declared by the Minister for Health by way of a legislative instrument (the Declaration).

May we also take this opportunity to highlight some general concerns in regard to section 129AAD of the *Health Insurance Act 1973*. RACS understands the significance of this provision and how central it is to the Review. Compliance to any MBS auditing and concerns for any discrepancies found in relation to a surgeon will result in a letter from the MBS Compliance division of the Department of Health.

In that initial letter the contents are usually of a nature surrounding concerns that a surgeon has been non-compliant, and that documented evidence will be requested to demonstrate that the surgeon has met the requirements of the items being audited. When a surgeon has been deemed not to be co-operative then a formal Notice to Produce (NTP) is issued to that surgeon who has allegedly failed to respond to the initial letter from the Department.

Compliance to a NTP is a legal requirement under section 129AAD of the *Health Insurance Act 1973*.ⁱ However, there remains some confusion as to how this law clashes with that of the Australian Privacy Principles (APP), in particular APP 6.ⁱⁱ Any NTP letter from the MBS Compliance Division may also include providing documentation containing patient information. By doing so the surgeon may then be non-compliant with APP 6.

Disclosure of personal information to a person is allowed if it can be shown that there is a “sufficient interest in the health and welfare of a person, such as a general practitioner who has responsibility for the continuing care and treatment of an individual.”ⁱⁱⁱ This was demonstrated in the case of *F v Medical Specialist* [2009] PrivCmrA 8 (31 August 2009). Under APP 6 this is an example where a “secondary purpose is directly related to the primary purpose of collection.”^{iv}

But it is still unclear as to whether the discretionary MBS Compliance Division’s NTP is a primary purpose, let alone a secondary one as there is no link to “the continuing care and treatment of an individual” in accordance to case law. This could potentially create a legal and compliance quandary for our surgeons.

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In conclusion, does the act of complying to a NTF interfere with a patient's privacy under both the APP 6 and in statute law section 41(1)(a) of the *Privacy Act 1988* which relates to interference?^v

RACS is always open to meet and discuss these issues.

Sincerely

DR LAWRENCE MALISANO
COLLEGE VICE PRESIDENT

PROFESSOR MARK FRYDENBERG AM
CHAIR, HEALTH POLICY AND ADVOCACY

ⁱ HEALTH INSURANCE ACT 1973 - SECT 129AAD Notice to produce documents, [HEALTH INSURANCE ACT 1973 - SECT 129AAD Notice to produce documents \(austlii.edu.au\)](http://www.austlii.edu.au/au/other/dfat/special/health/health_insurance_act_1973_-_sect_129aad_notice_to_produce_documents.html)

ⁱⁱ Chapter 6: APP 6 — Use or disclosure of personal information, Office of the Australian Information Commissioner [Chapter 6: APP 6 — Use or disclosure of personal information — OAIC](http://www.oaic.gov.au/Chapter-6-APP-6-Use-or-disclosure-of-personal-information)

ⁱⁱⁱ *F v Medical Specialist [2009] PrivCmrA 8* (31 August 2009) [F v Medical Specialist \[2009\] PrivCmrA 8 \(31 August 2009\) \(austlii.edu.au\)](http://www.austlii.edu.au/au/other/dfat/special/privacy/privcmr/privcmr8.html)

^{iv} Chapter 6: APP 6 — Use or disclosure of personal information, Office of the Australian Information Commissioner, see 6.27 [Chapter 6: APP 6 — Use or disclosure of personal information — OAIC](http://www.oaic.gov.au/Chapter-6-APP-6-Use-or-disclosure-of-personal-information)

^v PRIVACY ACT 1988 - SECT 41 Commissioner may or must decide not to investigate etc. in certain circumstances [PRIVACY ACT 1988 - SECT 41 Commissioner may or must decide not to investigate etc. in certain circumstances \(austlii.edu.au\)](http://www.austlii.edu.au/au/other/dfat/special/privacy/privacy_act_1988_-_sect_41_commissioner_may_or_must_decide_not_to_investigate_etc_in_certain_circumstances.html)