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PCEHR/HI Discussion Paper Feedback
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Electronic Health Records and Healthcare Identifiers: Legislation Discussion Paper

Avant welcomes the opportunity to provide input into the Australian Government Department of Health's consultation on proposed changes to the personally controlled electronic health record (PCEHR) system, and the Healthcare Identifiers Service.

Our submissions on the Discussion Paper are attached.

Please contact me on the details below if you require any further information or clarification of the matters raised in this letter.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Georgie", followed by a long horizontal flourish.

Georgie Haysom
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About Avant

Avant Mutual Group Limited ("Avant") is Australia's largest medical defence organisation, and offers a range of insurance products and expert legal advice and assistance to over 64,000 medical and allied health practitioners and students in Australia. Our insurance products include medical indemnity insurance for individuals and practices, as well as private health insurance, which is offered through our subsidiary The Doctors' Health Fund Pty Limited.

Our members have access to medico-legal assistance via our Medico Legal Advisory Service. We have offices throughout Australia, and provide extensive risk advisory and education services to our members with the aim of reducing medico-legal risk.



Avant submissions on the Electronic Health Records and Healthcare Identifiers: Legislation Discussion Paper

A. General comments

Avant recognises the benefits of the PCEHR and has been supportive of ehealth initiatives.

Avant agrees that the PCEHR system, including the PCEHR Act and HI Act, should be consistent with the operation of the Commonwealth privacy framework and supports the alignment and use of consistent terminology in the three pieces of legislation.

Avant acknowledges that issues of operability, time and expense for practitioners are important to the successful adoption of the system. Avant supports:

- efforts to remove the uncertainty and lack of clarity for doctors in the operation of the PCEHR especially in areas that have the potential to increase medico-legal risk
- ongoing comprehensive training for practice managers and practitioners about the PCEHR system and medico-legal considerations.

Below we make comments about several of the legislative proposals outlined in the Discussion Paper. As the precise details of the proposals will be contained in the draft legislation, it is likely that we will make further submissions when the draft legislation is available.

B. Responses to selected consultation points

3.3 Participation

3.3.1 An opt-out PCEHR system?

Avant supports opt-out trials to determine the best system for adoption of the PCEHR. In light of the experience with the initial introduction of the PCEHR, it is vital that there be comprehensive education and training of both consumers and healthcare professionals about use of the PCEHR system in the trial regions.

Any future training should take into account the education and training programs that have been available in the past so that future training is meaningful for doctors and patients. This is especially important with the expected increased use of the PCEHR in opt-out trial regions. Consultation needs to occur with doctors about the content and form of training to be delivered.

Avant believes education and training should include issues of consent, opting-out, use of access controls, and must be completed in good time before the trials begin to ensure doctors are aware of their rights and responsibilities.

Registering healthcare provider organisations and other entities in opt-out trials

Avant notes that healthcare provider organisations, contracted service providers, repository operators and portal operators will continue to participate on an opt-in basis.

The proposed legislative amendments should be in place in good time before the opt-out trials begin to ensure that there is a seamless transition to the new arrangements before trials begin. There should be sufficient time for doctors and healthcare provider organisations who are not already registered to become registered if they wish, and for doctors and healthcare organisations to undertake training in the use of the PCEHR system.

The nature of the revised incentives to encourage practitioner use of the PCEHR is unclear in the Discussion Paper. In our experience, current payment arrangements act as a disincentive to practitioners using the PCEHR, as payment arrangements are limited to curating and uploading a record within the patient consultation.

Avant believes revised incentives must address the time taken to curate and maintain a PCEHR record *outside of* the consultation. This is especially relevant if amendments to the PCEHR Rules will impose a requirement to ensure “data quality” as referred to in 3.4.3 of the Discussion Paper.

3.4 Obligations of parties

3.4.1 Obligation to enter into participation agreement

Avant supports the removal of participation agreements and the transfer of some of the key obligations into the legislation.

Practices must be informed of these changes and ongoing education and information is required to ensure doctors and practices understand their legislative obligations.

The Discussion Paper refers to the transfer of key obligations from the participation agreements (data breach notification, licensing and copyright provisions) to the legislation. It is not clear what will happen to the other provisions in the participation agreement, nor are the transition arrangements clear. Further information on what will happen with the status of current participation agreements, including if they will be formally terminated from a set date, is needed.

Intellectual property

Avant supports the proposal that the PCEHR Act be amended to provide that copyright is not breached by individuals or organisations by either uploading or using documents on the PCEHR system. It should be clear that the intellectual property exemption extends to documents authored by a third party, for example, if a GP uploads a specialist letter or pathology report to the PCEHR.

Avant believes this is a helpful development and removes an element of confusion and risk for doctors and practices.

Liability

Avant supports the proposed disposal of the liability provisions, rather than transferring them to the legislation.

The participation agreements absolved the Commonwealth as system operator (absent negligence) of liability, so all of the risk was associated with the practice and/or practitioner. The proposed disposal of the liability provisions removes the concern that doctors would be taking on liability for risks associated with the PCEHR system that were outside their control.

Avant is of the view that the common law is sufficient to respond to any liability issues that may arise. It is unnecessary in our view for the liability provisions in the participation agreement to be transferred to the legislation.

Data breach notifications

Avant acknowledges the need to protect patient confidentiality and privacy and believes that the audit trails and optional access notifications available to patients will act as an additional oversight to potential data breaches.

The PCEHR aims to increase participation and engagement of practitioners. However, Avant believes moving towards a statutory data breach notification requirement will act as a disincentive for practitioners to use the PCEHR and will create a further and significant compliance burden.

Avant is concerned that legislative requirements will potentially expose practitioners and practices to increased sanctions and/or penalties for failure to notify data breaches. Some practitioners and practices are fearful of becoming involved in the PCEHR because of the potential for significant fines and penalties to be imposed for privacy breaches.

The proposed legislative amendments should be considered with this in mind.

Avant believes that the current voluntary data breach regime within the Privacy Act, together with audit trails and the proposed optional access notifications, is sufficient to protect patient privacy.

Avant suggests that continuing and further education ensuring the proactive maintenance of privacy is preferable to establishing a statutory mandatory data breach notification.

Whilst Avant does not agree with the proposed statutory requirement to report data breaches, if the proposal proceeds, the legislation must be clear about what constitutes a breach; when it is required to be notified and to whom it has to be notified. These amendments must be realistic and not impose undue compliance burden on practitioners or practices.

3.4.3 Obligation for organisations to have PCEHR policy

Avant agrees that organisations should have a PCEHR policy in place.

However, the proposed requirement for organisations to ensure “data quality” lacks clarity and may create an additional obligation on practices and practitioners.

Avant supports the position in the current framework which requires doctors to only upload accurate and up to date information. Avant would support the proposed legislative amendment if it reflects this position, rather than imposing an additional requirement on organisations.

3.4.4 Obligations on authorised and nominated representatives

Avant supports changes to clarify the provisions relating to authorised and nominated representatives to ensure consistency with the law generally in relation to substitute decision making.

3.4.6 Obligations to use PCEHR system

Avant supports the use of incentives to encourage practitioner use of the PCEHR system to the extent that it recognises the additional time and effort taken to maintain and curate the PCEHR.

Avant is cautious of payments tied to use of the PCEHR system. Any system that forces doctors to use the PCEHR in order to treat their patients, rather than doctors choosing to use the system, will not be welcomed by the profession.

3.4.7 Obligation for System Operator to notify decisions

Avant supports the use of electronic notification (e.g. by email) of decisions to cancel, suspend or vary an individual’s or an entity’s registration as this resolves a key gap that was in the participation agreement.

3.5 Privacy

3.5.1 Notification of PCEHR use

Avant supports the proposed amendment to add an optional access control alerting individuals each time their PCEHR is opened.

Avant believes this will protect patient privacy and will act as an additional oversight concerning a data breach. Further, these alerts will discourage unauthorised use and allow patients to clarify access to a particular record by a healthcare provider organisation.

3.5.3 Collection, use and disclosure of information

Avant agrees that the proposed principles-based approach and clarity around collection, use and disclosure of information is reasonable.

Avant wishes to consider the detailed amendments before providing further comments.

3.5.4 Penalties for misuse of information

The Australian Privacy Principles regard health information as one of the most sensitive types of personal information. Health practitioners have a fundamental role in ensuring the privacy of patient health information and should take reasonable steps to safeguard patient information.

Avant's members, who have their patients' records and private health information entrusted to them, take their privacy obligations very seriously.

Avant is concerned that consideration is being given to introducing criminal offences for serious breaches of privacy. Avant believes civil penalties are sufficient.

As the intention is to align the PCEHR Act, HI Act and the Privacy Act, it is unclear why it is proposed that criminal penalties be introduced to the PCEHR Act considering the Privacy Act only imposes civil penalties for privacy breaches.

The proposed introduction of criminal penalties will act as a disincentive for doctors and practices to engage with and use the PCEHR because of the fear that an inadvertent breach could lead to a criminal offence.

Significant concerns were raised by the profession when increased civil penalties for privacy breaches were introduced to the Privacy Act in March 2014. If criminal offences are introduced, it is likely that there will be a similar response from the profession. Instead of increasing adoption and use by practitioners and practices, this approach could well have the opposite effect.

Avant suggests that continuing and further education ensuring the proactive maintenance of privacy is preferable to the establishment of a graduated framework that includes criminal penalties.

Avant agrees that healthcare identifiers are simply a number and do not contain any health information. The misuse of individuals' healthcare identifiers should *not* continue to be criminal offence.

Misuse of the PCEHR should incur civil penalties, not criminal penalties, consistent with the current privacy legislative framework.

Avant contact details

Should you have any further queries in relation to this submission, please contact:

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