

PCEHR Legislation Issues Feedback
Department of Health and Ageing
GPO Box 9848
CANBERRA ACT 2601

SUBMISSION FROM THE AUSTRALIAN PRIVATE HOSPITALS ASSOCIATION

On behalf of the Australian Private Hospitals Association (APHA), I attach a short submission on the Exposure Draft of the legislation designed to introduce a regime for a Personally Controlled Electronic Health Record (PCEHR) in Australia.

APHA is the peak national body representing the interests of the private hospital sector, with a diverse membership that includes large and small hospitals and day surgeries, for profit and not for profit hospitals, groups as well as independent facilities, located in both metropolitan and rural areas throughout Australia. The range of facilities represented by APHA includes acute medical surgical hospitals, specialist psychiatric and rehabilitation hospitals and also free-standing day hospital facilities.

In making this submission, APHA has referenced the Companion Paper that accompanies the Exposure Draft.

APHA notes that there have been many public statements, both by the Minister for Health and Ageing and the National Ehealth Transition Authority, that the PCEHR will be introduced on 1 July 2012. These statements assume that the legislation will pass through the Federal Parliament before that date. APHA urges that if submissions and comments on the Exposure Draft indicate that re-drafting is required, that the Government ensures that this work is done thoroughly, even if this delays the passage of the legislation. It is more important to get the details of the law correct than to meet an arbitrary political deadline.

Please contact me at barbara.carney@apha.org.au with any queries about this submission.

Yours sincerely

Dr Barbara Carney
DIRECTOR POLICY AND RESEARCH
28 October 2011

AUSTRALIAN PRIVATE HOSPITALS ASSOCIATION

Comments on PCEHR Legislation Companion Paper

3.2.7 Intellectual property

There may be property rights, mainly copyright, in some of the documents which are potentially uploaded by a health care provider organisation into the PCEHR system. There needs to be management of these rights within the PCEHR system, whether by legislation or by contractual arrangements.

Proposal 23: The assignment of intellectual property rights for the PCEHR system would be based in either legislation or contract. The changes required will be further developed as feedback is received as part of the consultation process.

Q13. Are you aware of specific examples of information for which intellectual property rights might present a significant barrier to the use of the information in the PCEHR system?

The PCEHR system has potential to be a valuable tool in increasing the understanding of health-related issues and ultimately in improving the ability not only to address but also to overcome the lack of synchronicity in Australia's current delivery of health services. Ideally, consumers, carers, health care providers, researchers, policy makers, as well as software developers and manufacturers will benefit from the PCEHR system.

Therefore, high quality data is essential if the system is to meet the goal that government has set for it. There must be a mechanism to ensure the integrity, adequacy and consistency of data collected through the PCEHR system. The burden of collecting the data will rest primarily upon clinicians, medical practitioners and other health care providers which in practical terms, will hold the rights to the intellectual property of their collected data. Therefore, APHA **recommends** that some form of incentive should be provided to the holders of intellectual property rights by any commercial entity that will benefit from the use of these data. In this context, it is also important to emphasise that the regime of rules, regulations, fees and penalties associated with the PCEHR system should not be so onerous they become more of a deterrent to the investment from innovation driven investments through both private and public sectors. Nor should intellectual property rights should be so tightly defined that they prevent or undermine the inter-communicability of different components within the PCEHR system. Therefore, there should be only *one independent body* responsible for dealing with intellectual property and related matters.

3.5.1 Offences and penalties

Proposal 38: The legislation may not include an obligation of confidentiality on the PCEHR system operator or its employees or contractors. Instead, inappropriate handling of personal information would be dealt with under existing privacy, disciplinary or criminal law.

Q31. If the system operator is an agency and its employees are subject to the Code, would these disciplinary measures be sufficient?

Q32: If the PCEHR system operator is a private sector organisation would additional mechanisms be required?

Simplicity and consistency should be the first priority for all decision makers involved. This is a system which is intended to be used by many consumers and health care providers throughout Australia. Therefore, having a consistent law that applies equally to everyone across different agencies, states and territories, will enhance take-up rates and the on-going viability of the system. APHA therefore strongly believes and recommends that privacy and disciplinary laws should be applied equally to both public and private agencies and organisations across Australia. If the existing Commonwealth *Public Service Act 1999* (and any alteration to it), is deemed to be sufficient for the PCEHR system, its provisions should be able to be applied equally and consistently to everyone involved across Australia.

Penalties

In regard to **penalties**, APHA notes that 3.4.1 Division 1 of the Draft Bill (page 26) an amount of 120 penalty units or \$13, 200 in civil pecuniary penalties is referred to, whereas in 3.5 Part 5 (page 29) an amount of \$14 400 is referred to as comprising 120 penalty units. This appears inconsistent.

More importantly, the amounts specified as penalties are so onerous that they are likely to act as a deterrent for organisations to join the system. APHA recognises that the privacy regime associated with the PCEHR must be robust, but there must also be a better balance between penalties and the need to encourage take-up.

In this regard, it is also important to note that **Division 3** of the draft Bill, **Authorisations of Entities also cover employees** is very vague as to how this part of the system will operate. Much more clarity and detail is needed to assure organisations about how they can best delegate responsibility without inadvertently breaching the law. In a clinical environment such as a hospital, there may be a need for a number of employees to be able to access a patient's PCEHR.

Other matters

APHA is concerned that Government has not addressed anywhere in its published documents the administrative load, the IT infrastructure and initial cost of setting up the system, ongoing

maintenance of the system, training of staff, and increased responsibility and liability associated with the adoption of the PCEHR system to hospitals, clinicians and health care providers. All of the above are deterrent factors for the providers of health services to sign up to the PCEHR system and promoting it to their patients. While the Government is focusing principally on half of the equation (i.e. the consumers/patients) it risks ignoring the other second half of the equation (i.e. hospitals, clinicians and health care providers) without which the successful delivery of the system with its significant potential will not be possible.

The key to mass participation and successful engagement of health care providers, which will have a strong influence on their patients as the consumers of the PCEHR system, is the introduction of a clear and transparent set of strategies by the Government to address how the financial burdens on these organisations and individuals will be compensated for. Given that the Government has already made its decision in regard to the adoption of an “**opt in**” rather than an “**opt out**” model for the PCEHR, it should not underestimate the level of trust and confidence that patients as potential consumers of the PCEHR system have on their GPs and other clinicians. Health care providers are a critical factor in successful delivery of the system. Therefore, APHA **recommends** that the Government should provide some incentive measures to ease the financial burden of adapting to the PCEHR system, as well as to facilitate consumer take-up.