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AMA Submission: Inquiry into the Health Legislation Amendment (eHealth) Bill 2015

The AMA supports the Health Legislation Amendment (eHealth) Bill in general but does not support the introduction of new and increased civil penalties and new criminal penalties for healthcare providers and healthcare provider organisations.

The proposed penalties are not justified and are likely to have a negative impact on healthcare provider and healthcare provider organisation participation in the Personally Controlled Electronic Health Record (PCEHR).

Is there a need for new penalties?

For the more than 3 years of its operation to date, it has not been considered necessary to have criminal penalties in place for possible breaches of the PCEHR.

The Department of Health's Legislation Discussion Paper (May 2015) offered no information about the number and nature of breaches that have occurred, provided no justification for a graduated scheme of penalties to address particular types of breaches, and gave no specific details of any imperative to align penalty structures across the Healthcare Identifiers and PCEHR Acts.

There is no requirement for the PCEHR penalty structure to be brought into line with penalties in the Healthcare Identifier Act 2010. The two Acts deal with very different matters, with the consequences for accessing demographic information attached to healthcare identifiers being significantly different from accessing information in an individual PCEHR.

Medical practitioners and people who work in medical practices deal with confidential health information in both paper and electronic formats all the time. There is nothing inherently different or unique about dealing with the same information in the PCEHR.

To date, there has been no reported case of healthcare practitioners accessing clinical records on the PCEHR for people who are not patients of the practice.

Proposed new penalties in Health Legislation Amendment (eHealth) Bill

The Bill now before Parliament proposes new and significantly increased civil penalties and new criminal penalties in relation to the misuse of information contained in a PCEHR.

With no explicit requirement or specific justification, the proposed legislation will dramatically escalate breaches of the PCEHR to be subject to substantial civil penalties (up to \$108,000 for an individual, or \$540,000 for a body corporate), and criminal penalties (2 years' imprisonment for a fault-based offence and/or a \$21,600 fine).

Exactly what actions will qualify for what penalties under the proposed 'graduated framework for responding to inappropriate behaviour' in the Bill is unclear. This includes whether a particular breach would create liability for criminal, as opposed to civil, penalties.

There is no justification for any changes to the current penalty regime applicable to healthcare providers and healthcare provider organisations. The penalties currently available for the following matters under the PCEHR Act 2012 should be retained:

Unauthorised use of PCEHR information: Penalties for the unauthorised collection, use and disclosure of health information contained in a patient's PCEHR where the person knows or is reckless to the fact the action is unauthorised **should remain** as a civil penalty of up to 120 penalty units (currently \$21,600). (Section 59 of the PCEHR Act).

The AMA proposes that clauses 85 and 86 of the Health Legislation Amendment (eHealth) Bill, which would increase the current civil penalty five-fold to 600 penalty units and introduce a new criminal penalty of up to two years' imprisonment, should be removed before the Bill is passed.

Secondary disclosure of PCEHR information: Penalties for secondary disclosure where the person knows or is reckless as to whether the disclosure is based on unauthorised use of PCEHR information **should also remain** as a civil penalty of up to 120 penalty units (currently \$21,600). (Section 60 of the PCEHR Act).

The AMA proposes that clauses 87 and 88 of the Health Legislation Amendment (eHealth) Bill, which propose to increase the current civil penalty five-fold to 600 penalty units and introduce a new criminal penalty of up to two years' imprisonment, should be removed before the Bill is passed.

Notifying System Operator of breaches: The penalty for not notifying the System Operator of a data breach or potential data breach **should remain** applicable as per the PCEHR Act to the System Operator, registered repository operator or registered portal operator.

Healthcare provider organisations **should have the same** obligations and sanction as has applied to them to date under the Participation Agreement, with failure to notify (as described in Section 75) resulting in termination of participation. This sanction should continue. There is no justification for a civil penalty to now apply to healthcare provider organisations.

There have been no reported occurrences to date of breaches by healthcare provider organisations concerning PCEHR information that would have warranted termination of a practice's participation.

Clause 90 of the Health Legislation Amendment (eHealth) Bill should be amended to exclude healthcare provider organisations from liability for a civil penalty.

Consequences of proposed new penalties

As there is no evidence that the new penalties are needed to address a known problem, enacting these provisions will be a very strong deterrent to healthcare providers and healthcare provider organisations participating in the PCEHR.

The AMA urges the Committee and the Parliament to reject the introduction of increased civil penalties and new criminal sanctions for healthcare providers and healthcare provider organisations in relation to the PCEHR.

Contact

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