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Committee Secretary
Senate Standing Committees on Community Affairs
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Re: Health Legislation Amendment (eHealth) Bill 2015

The Australian Dental Association (ADA) thanks the Department of Health (Department) for the invitation to comment on the *Health Legislation Amendment (eHealth) Bill 2015* (eHealth Bill). The ADA is the peak national professional body representing the vast majority of Australia's dentists and dental students across both the public and private sectors.

Note that our comments are in response to the Explanatory Memorandum (EM) that outlines the intent of this proposed legislation.

The EM states that the Bill seeks to further the adoption of a national electronic health record system, to be known as My Health Record (MyHR) system, by implementing:

> *Option 3B: Implementing participation trials, including opt-out, with targeted communications in the trial regions and education and training of healthcare providers, improving usability and changing the governance arrangements through creation of a statutory authority.*

In its discussion on the impact on healthcare provider organisations for adopting Option 3B via the Bill, the EM states that, amongst other things:

> *Participation for healthcare provider organisations would remain opt-in. There would be an indirect impact on healthcare provider organisations in trial regions and those providing treatment to individuals in trial regions, since opt-out participation will increase the value of the PCEHR system for these providers. It is therefore likely that additional healthcare provider organisations would register during the trials. Until the trial regions are selected it is not possible to quantify how many additional organisations are likely to register so for the purpose of this proposal it is estimated that 50 additional organisations would register (page 23)*

The EM repeatedly states the Australian Government's intention to ensure that there is education, guidance and training provided to healthcare provider organisations and others about not only how the MyHR system works but also on the corresponding obligations outlined in the Bill.

The ADA would like to emphasise that if healthcare provider organisations do not have an adequate level of comfort and confidence about how to use the system and what their obligations are and how they can simply comply with those obligations, under the Bill as it stands, there is a real risk that these healthcare provider organisations will not register to participate in the MyHR system, even in these opt-out trial sites where healthcare recipients automatically have corresponding MyHRs set up.

The proposed penalties under the Bill are very stringent and could potentially lead to someone being heavily punished for an inadvertent error or something they had no role in, both of which are unacceptable. For example, sections 59 and 60 state that a person knowing about, or is reckless about the unauthorised collection, use or disclosure of health information in a MHR can incur:

- A civil penalty of up to 600 penalty units (currently $108,000 for individuals and $540,000 for bodies corporate); or
- A criminal penalty up to two years' imprisonment and/or 120 penalty units (currently $21,600 for individuals and $108,000 for bodies corporate).

The critical importance of ensuring that there is an effective communications and education campaign for all healthcare provider organisations and providers is highlighted by the Bill's large range of penalties (both civil and criminal) that will apply on those that fail to report on MyHR breaches or security threats. This risk is further compounded by the fact that the Bill outlines that in the case of partnerships and other associations, where one partner has committed a breach that the liability is attributed to the partnership as a whole (sections 100-103, page 89). If a dental practice were to register to the MyHR system as a healthcare provider organisation, all partners within the practice are at risk of being liable for one of their practitioner's breach of any of the obligations under the Bill and subject to the heavy penalties outlined.

While the EM does state that the Bill does not intend to punish accidental unauthorised collection, use or disclosure of health information in a MyHR, or disclosures made for the purposes of investigating a previous unauthorised disclosure, the strict threshold that deems "knowledge" of unauthorised disclosure to be sufficient to be considered a breach means that there is a corresponding heavy burden on the Australian Government to ensure that all parties are adequately informed about their obligations and how to confidently use the MyHR system and any investigations of beaches and subsequent penalties follow natural justice principles.

Other examples of the Bill's wide range of complex and strict obligations can be found in section 75, which requires healthcare provider organisations to report potential data breaches to the System Operator or the Information Commissioner. The EM notes that:

> *"If there is a possibility that a breach had occurred but that possibility has not yet been confirmed, a lack of certainty about whether in fact there has been a breach should not be used as a reason for postponing data breach reporting and carrying out any necessary remedial actions" (page 85).*

Another major obligation is also under section 75, which requires healthcare provider organisations to notify the general public of a breach if a 'significant' number of healthcare recipients are affected by that breach (page 86).

The ADA would like to emphasise that the "significant communications strategy" referred to by the EM must be targeted to all healthcare provider organisations and practitioners and not restricted to healthcare provider organisations and practitioners within the opt-out trail sites.

When it comes to the proposed change for the Personally Controlled Electronic Health Record name to "My Health Record", the EM explains this approach as "intended to recognise that a health record is the result of a partnership between a healthcare recipient and a healthcare provider". However with respect the ADA believes that retaining the name "Record" risks being

confusing for health practitioners and patients alike. Given it is a summary and not a complete record the title “My Health Summary” is more appropriate and clear.

When it comes to assessing practices’ responsiveness to report on and address data breaches, the Bill adopts a ‘one size fits all’ approach which does not consider the fact that the majority of dentists work in office based practices and as such the resources available to them are limited and not the same as those for health practitioners in hospital or corporate organisations where records are handled by dedicated staff. The ADA urges that any security and data quality requirements be reasonable and proportionate and take into account that health practitioners work within a variety of organisational and business structures and so they have varying levels of resources at their disposal to conform to security/data requirements.

The Department is advised to incorporate the above suggestions for the ultimate success of the opt-out trials and the overall operation of the national electronic health record system.

Yours faithfully,

Dr Rick Olive AM RFD
Federal President, Australian Dental Association