INSURANCE COUNCIL OF AUSTRALIA

PCEHR Legislation Issues Feedback
Department of Health and Ageing
GPO Box 9848
Canberra, ACT 2606

Via email: email to: ehealth.legislation@health.gov.au

3 November 2011

Dear Mr Leveritt

**Exposure Draft - Personally Controlled Electronic Health Records Bill 2011 (PCEHR Draft Bill)**

The Insurance Council of Australia (Insurance Council)[1], the representative body of the general insurance industry in Australia, welcomes the opportunity to provide a short submission on the PCEHR Draft Bill. We understand some of our members may also provide individual submissions. We appreciate the consultative approach on this significant initiative. Representatives of the Insurance Council and members have attended the NEHTA Workshops.

This submission will canvass some definitional issues, areas we would appreciate further clarification in the PCEHR Draft Bill and areas which raise liability concerns. While we note the Companion Document and Concept of Operations Paper offer assistance in many areas, the Insurance Council would welcome more certainty to be provided within the PCEHR Draft Bill itself. For example:

- *Role of Nominated representatives*: Our members are concerned the draft PCEHR Bill is not sufficiently clear on the effect of being a nominated representative. The Concept of Operations Paper makes it clear nominated representatives are not recognised by the PCEHR System as having legal authority to act on behalf of an individual. In the Bill however the absence of any reference to the effect of being a nominated representative, unlike being an authorised representative, has the potential to create confusion.

- *Role of an 'Authorised representative'*: Notwithstanding references to the role of an authorised representative, an alignment with the controls of the consumer (such as in sections 56, 57, 59 & 60 collection, use and disclosure in accordance with access controls) would be useful.

- *Definition of 'Healthcare'*: The definition may create potential issues as it appears to exclude cosmetic procedures/treatments and plastic/reconstructive treatment.

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[1] The Insurance Council of Australia's members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. December 2010 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of $33.4 billion per annum and has total assets of $101.7 billion. The industry employs approx 60,000 people and on average pays out about $87 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

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In addition, section 5(b) refers to the 'dispensing on prescription of a drug or medicinal by a pharmacist' which has the potential to create uncertainty in relation to herbal/natural/complementary compounds. With the regulation of Chinese Medicine practitioners and increased integration of complementary medicine the Insurance Council submits the definition might be improved by referring instead to: 'a recommendation and/or prescription and/or supply of a drug or medicinal preparation by a healthcare provider.'

- *Consent (section 39)*: We would appreciate clarification in the draft PCEHR Bill as to who is responsible for uploading results of investigations (pathology/radiology) and who would be responsible for obtaining the consumer's consent.

There are also certain provisions of the Draft PCEHR Bill with which members have concerns about the legal implications. These include:

- *Privacy - pseudonyms (section 34)*: There may be situations where a patient uses a pseudonym which is not their own and the healthcare provider reads or adds to the records in reliance on the truthfulness of the pseudonym. As the healthcare provider is unable to check the identity of the patient, an inadvertent breach may occur which could attract sanctions under the proposed legislation. The Insurance Council would appreciate the inclusion of safeguards to prevent the improper use of pseudonyms either in the draft PCEHR Bill itself or in the PCEHR Rules which are to be developed by the Minister responsible for the Act.

- *Refusal of treatment (section 40)*: Members have expressed concern that sections 40 & 40(2)(a) could deter a healthcare provider from exercising their usual rights and responsibilities in relation to the provision or refusal of treatment to a patient. For instance, a patient may refuse access or place controls on access to results referenced in another practitioner's notes on the PCEHR and a practitioner may refer the patient to someone else (in effect refusing to treat without having access to information). We submit the section should be clarified to ensure it does not inadvertently interfere in the ability of a practitioner to refuse treatment on a legitimate basis.

- *Disclosure to courts and tribunals (section 61):* It is proposed that for all matters, apart from proceedings relating to the Act, the system operator will not be able to disclose health information included in the PCEHR to a court or tribunal unless the consumer consents. This creates concern in relation to civil litigation and we would appreciate clarification as to whether a defendant could gain access to the PCEHR by subpoena to defend an action.

If you have questions about any of the matters discussed in this submission, please contact Mr John Anning, Insurance Council's General Manager Policy – Regulation at janning@insurancecouncil.com.au.

Yours sincerely

Robert Whelan
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