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Office of the Australian Information Commissioner

By email: privacyreformtranche1@oaic.gov.au

Avant response to OAIC Consultation on Guidance for Transparency in Automated Decision-Making Obligation (APP1)

Thank you for the opportunity to provide feedback on the consultation for development of guidance on the automated decision-making (ADM) transparency obligation.

About Avant

Avant is a member-owned doctors' organisation and Australia's largest medical indemnity insurer, committed to supporting a sustainable health system that provides quality care to the Australian community. Avant provides professional indemnity insurance and legal advice and assistance to more than 95,000 healthcare practitioners and students around Australia (more than half of Australia's doctors). Our members are from all medical specialities and career stages and from every state and territory in Australia.

We assist members in civil litigation, professional conduct matters, and a range of other matters. Our Medico-legal Advisory Service provides support and advice to members and insured medical practices when they encounter medico-legal issues, particularly those involving privacy matters. We aim to promote quality, safety and professionalism in medical practice through advocacy, research and medico-legal education.

In the last few years, we have run education campaigns for our members on artificial intelligence in healthcare and on privacy in practice to improve their knowledge and to support compliance. The OAIC's resources on privacy in healthcare are extremely helpful to us in advising our members about privacy requirements and compliance obligations.

Our experience and feedback

From our experience assisting members and practices, the key issues they face in preparing to implement this change is uncertainty about:

- The extent to which they are required to provide technical detail in their privacy policies about how computer programs make decisions.
- Which entity is responsible for providing information to patients where computer programs are incorporated into systems or equipment used when treating their patients, and within a wider digitally-connected system.
- Whether healthcare providers can refuse to provide care to a patient if they do not agree with the use of ADM as outlined in their privacy policy.

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Australian health services are increasingly part of an inter-connected digital health network. As a result of the increasing use of technology, healthcare providers are uncertain about how much information is required in their privacy policies about how ADM computer systems function both at the individual practice level and in relation to the digital connectedness of the wider health system.

This is relevant to the meaning of "arranged for" a computer program to make a decision. Accordingly, it would be beneficial if healthcare-specific examples are included in the guidance to help clarify the extent of each provider's obligation to disclose the ADM they are using directly and indirectly, via digital systems in the wider healthcare network.

We agree with the OAIC's view that entities must ensure that meaningful and accessible information is provided to consumers. We agree that entities need to strike an appropriate balance to ensure disclosures satisfy the points outlined in question 12. The patient needs to have sufficient detail to determine whether they are comfortable with their personal information being used in ADM or enable them to seek further information.

While we do not think there is anything additional that entities should disclose, it would be helpful for the guidance to outline the extent of technical information, if any, needed to be disclosed. Providing technical details may confuse or otherwise impede the provision of healthcare, particularly for those patients who are digitally naïve. While information needs to be appropriately tailored this may differ depending on the patient's level of health and digital literacy. On the other hand, providing insufficient information about the use of ADM to patients may inhibit their access to care, for example if they decline consent to using ADM embedded in their systems.

There have been media reports of patients refusing to provide consent to AI scribe use and being refused care (see for example Melbourne psychiatrist refuses new patients who don't consent to AI note-taking | Health | The Guardian, Kobi refused a doctor's AI. She was told to go elsewhere | Information Age | ACS, and Neural Notes: When saying no to AI means losing your doctor). While in some cases it is possible to provide care in a different way, this may not be possible where ADM and artificial intelligence is embedded into practice systems, medical tools and equipment and workflows. It would be helpful for the OAIC to provide guidance to practitioners on how to manage situations such as these, including health-specific scenarios as suggested above.

We would be pleased to discuss any aspect of the above with you. Please contact me on the details below if you require any further information or clarification of the matters raised in the submission.

Yours sincerely

[redacted]

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General Manager, Advocacy, Education and Research
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