



Australian Government
Professional Services Review

***Inquiry into the Health Legislation
Amendment (Medicare Compliance and
Other Measures) Bill 2021***

Submission from the Professional Services Review
to the Senate Community Affairs Legislation Committee

2 February 2022

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Introduction

The Professional Services Review (PSR) welcomes the opportunity to make a submission to the inquiry into the Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021.

Under the *Health Insurance Act 1973*, delegates of the Chief Executive Medicare within the Department of Health may request the Director of PSR to review the provision of services by **‘persons under review’**. A person under review may be a **‘practitioner’** (a medical practitioner, dentist, nurse practitioner, or other allied health practitioner) or another **‘person’**, including a corporation, who employs or engages practitioners to provide services at one or any number of locations across Australia.

A person engages in **‘inappropriate practice’** if they knowingly, recklessly, or negligently cause or permit a practitioner employed or otherwise engaged by them to engage in conduct that constitutes inappropriate practice by the practitioner under the Act. For a practitioner, ‘inappropriate practice’ is defined as conduct in connection with initiating or rendering a service that would be unacceptable to the general body of the practitioner’s profession or specialty. A practitioner may also engage in inappropriate practice if they engaged in conduct defined by regulations as a ‘prescribed pattern of services’.

Currently, the Director of PSR is able to enter into agreements *only* with practitioners, and not with corporations or other persons who are not practitioners. The Bill, if enacted, would enable the Director to enter into agreements with any person under review who acknowledges inappropriate practice (including bodies corporate); and introduce new sanctions for persons who fail to respond to a notice to produce documents to the Director of PSR or to a PSR Committee, or fail to appear at hearings.

Section 92 agreements

Current provisions

Currently, section 92 permits the Director to enter into an agreement with a person under review only if that person is a practitioner. A number of corporations have been referred to the PSR. One or more of those companies have expressed the desire, if possible, to enter into an agreement with the Director for repayment of benefits rather than cause further expense to themselves and the Commonwealth by being referred to a PSR Committee for investigation. Under the current legislation that is not possible: if the Director cannot be satisfied that there are insufficient grounds on which a Committee could reasonably find that the corporation engaged in inappropriate practice, the Director must establish an independent PSR Committee to investigate the corporation’s provision of services.

Proposed changes

The changes proposed in the Bill would enable the Director, at her discretion, to enter into an agreement with any person under review, whether or not they are a practitioner. The PSR would welcome the ability, in appropriate cases, for the Director to negotiate an agreement with a non-practitioner person under review.

PSR Committees involve considerable expense, time and resources, not only for the Commonwealth but also for the person under review, whose focus may be diverted from the appropriate provision of services. By enabling the Director to enter into agreements with corporations, there would be the potential for a saving to the Commonwealth and an earlier change in behaviour in those corporations seeking an early resolution of their matter.

The Determining Authority, established under the *Health Insurance Act 1973*, is an independent body that has the role of ratifying agreements before they can come into force to ensure that they are fair and reasonable. The Authority would continue to have that role under the proposed changes.

Transitional provisions in the Bill would enable the Director to enter into negotiations for an agreement for a corporate person under review who had been referred to a PSR Committee before the amending legislation commenced.

Failure to provide documents under a notice to produce

Current provisions

Currently, if a person under review that is a corporation intentionally fails to provide documents in response to a notice to produce, the only sanction available is to disqualify every practitioner employed or otherwise engaged by that corporation from being able to render services under the MBS. Such a broad-reaching sanction would adversely affect innocent practitioners and their patients. A sanction is needed that is proportionate and a sufficient deterrent to encourage compliance with a notice to produce.

Proposed changes

The proposed changes would provide appropriate sanctions to encourage production of the requested documents, namely a civil penalty, or a referral to the Federal Court to inquire into the alleged non-compliance and the capacity for the Court to order compliance.

Rights of bodies corporate before a PSR Committee

Current provisions

Currently, if a Committee proposes to hold a hearing, it may require the person under review to attend at the hearing and give evidence. The current provisions do not differentiate between individuals and body corporates and do not indicate who may be required to attend hearings to give evidence on behalf of a body corporate. Clarification is needed to identify who may be required to give evidence on behalf of a body corporate that is a person under review.

Proposed changes

The proposed changes would provide that a Committee may require an executive officer of the body corporate to appear at a hearing and give evidence on behalf of a body corporate. By requiring an executive officer to give evidence, the proposed changes ensure that a Committee can obtain evidence from a senior officer of the company who has the corporate knowledge and authority to give evidence on the body corporate's behalf.

Failure to attend hearings

Current provisions

Currently, a person under review who is a practitioner may be fully disqualified from billing Medicare if they fail to appear and give evidence at a Committee hearing in accordance with a notice under section 102. However, there are currently no consequences where the person under review is a body corporate or an individual who is not a practitioner. Failure to attend or participate in a Committee hearing can significantly impede the conduct of the Committee's investigation. Amendments are needed to ensure persons under review who are not practitioners are also deterred from not complying with statutory notices to appear and give evidence at a Committee hearing.

Proposed changes

The changes proposed in the bill would make it an offence for persons under review who are not practitioners to fail to attend (or cause an executive officer to attend) a hearing or give evidence at a hearing pursuant to a notice under section 102. The proposed changes would provide appropriate measures to encourage attendance and participation in Committee hearings.