MDA National
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25 August 2011

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Senate Standing Committees on Community Affairs
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By email: community.affairs.sen@aph.gov.au

Dear Dr Holland

REVIEW OF THE PROFESSIONAL SERVICES REVIEW (PSR) SCHEME

Thank you for you for the opportunity to provide a submission in relation to the Inquiry into the Professional Services Review (PSR) Scheme.

Established in 1925, MDA National is a leading provider of medical defence and medico-legal advocacy services. With over 25,000 Members, it works in close partnership with the medical profession on a wide range of issues which impact on medical practice. In addition to its advocacy and advisory services, MDA National's insurance subsidiary (MDA National Insurance) offers insurance policies to MDA National's Members which provide cover for the defence costs of investigations of professional misconduct and for claims for compensation by third parties.

MDA National understands the importance of protecting the integrity of the MBS and PBS Schemes. We accept that patients, the community and the Commonwealth should be protected from the risks, including the financial costs, associated with inappropriate practice by health practitioners. The process for achieving these goals must be fair, timely and transparent so that the public and health professionals have confidence in the system.

MDA National provides the following comments in response to the terms of reference:

a. the structure and composition of the PSR, including:

i. criteria for selection of the executive and constituent members encompassing their experience in administrative review proceedings,
ii. the role of specialist health professionals in assisting in cases where members lack relevant specialist expertise, and
iii. accountability of all parties under the Act;

The PSR Scheme was developed to provide an effective peer review mechanism to deal quickly and fairly with concerns about inappropriate practice.

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MDA National supports a peer review process in determining if inappropriate practice has occurred; however, any peer review process must involve genuine peers. We note that as at 30 June 2009, there were 158 members who were available to serve on PSR Committees and we understand that there may be fewer members currently available to serve on these committees. General practice, in particular, is a very diverse specialty, with significant differences associated with the geographical location of the practice, patient demographics and GPs who work full-time or part-time and with different sub-specialty expertise. It is essential that practitioners under review are provided with appropriate peer review. For example, MDA National is aware of one case where a plastic surgeon was involved in the review of a GP who was performing skin cancer work, and another case where a dual specialty qualified practitioner did not have a similarly qualified peer on the PSR Committee.

Importantly, the peers must apply an appropriate standard with respect to their assessment of the clinical relevance and adequacy of the services provided by the practitioner and not a "gold standard". MDA National notes all of the PSR Committee reports finalised in 2008-09 and 2009-10 made a finding of inappropriate practice (a total of 49 Committee hearings).

MDA National submits that an increased use of independent medical experts who could provide reports and/or give evidence before the Director or a PSR Committee would assist in providing more appropriate peer review. Expert reports could be commissioned by the Director or PSR Committee and also the practitioner under review, or joint expert reports could be obtained where both parties agreed to a single expert. The expert evidence would then be considered by the Director or the PSR Committee, along with the written and oral submissions by the practitioner under review. MDA National is aware of some cases where expert opinion has been obtained by a practitioner under review and the experts have been made available to provide oral evidence before a PSR Committee but not asked any questions or required to provide clarification of their opinions. MDA National submits that the process of expert opinion would be facilitated by the development of guidelines, which would include guidance on the admissibility of expert evidence and how the evidence should be considered and utlilised by the Director or the PSR Committee.

Consideration should also be given to having the PSR Committees chaired by a legally qualified person with experience in administrative review proceedings.

b. current operating procedures and processes used to guide committees in reviewing cases;

MDA National is unable to comment on this issue.

c. procedures for investigating alleged breaches under the Act;

d. pathways available to practitioners or health professionals under review to respond to any alleged breach;

The procedures for investigating alleged breaches under the Act include:

i. The review by the Director of PSR.

The Director undertakes the review if, after considering the Medicare Australia request, the Director forms the view that the practitioner may have engaged in inappropriate practice. This generally involves a review of the original patient records and a meeting between the Director and the practitioner.

The purpose of the review meeting is to facilitate an exchange of information and provide the practitioner with an opportunity to provide a verbal explanation of their practice. MDA National submits that at these review meetings it is often difficult for practitioners to respond to any concerns raised by the Director and explain their practice. In our experience, the Director does not provide specific findings of his review, including the actual medical records he has reviewed. Instead, practitioners are often provided with "motherhood statements", e.g. "you prescribe too many antibiotics", which makes it difficult for the practitioner to provide a specific response and explanation at the meeting. The discussion is often much broader than the issues raised in the referral by Medicare Australia.

One of the outcomes available to the Director is to enter into a Negotiated Agreement. It is MDA National's experience that a large number of practitioners will seek such an outcome, in order to avoid the stress, costs and publicity associated with proceeding to a PSR Committee.

ii. Referral to a PSR Committee.

It has been MDA National's invariable experience that practitioners who are involved in a PSR Committee hearing find it a very difficult, onerous, lengthy and stressful experience. Committee hearings have become lengthy, lasting up to six days. While the practitioner is entitled to be accompanied by a legal adviser, they are not entitled to formal legal representation at the hearing. Therefore, practitioners are required to give evidence, with only relatively brief breaks during the day, and be interrogated by the three PSR Committee members. It is our experience that most practitioners have difficulty in responding to the questions and putting their explanations forward over the duration of the hearing.

MDA National submits that practitioners are denied procedural fairness by not being legally represented during the hearing which is accorded to other practitioners who are required to attend the Medicare Participation Review Committee and the Administrative Appeals Tribunal.

MDA National submits that the PSR should publish guidelines for practitioners on how Committee hearings are to take place.

Further, MDA National submits the internal procedures be broader to allow for an external merits review in the Administrative Appeals Tribunal as is the case with other reviews of Commonwealth Regulatory bodies.

MDA National is aware of cases where the PSR Committee has appeared reluctant to accept expert evidence, including statistical information. As noted above, MDA National submits that the PSR Committee process could be improved by the greater use of independent expert medical evidence. This may also assist in reducing the length of the hearings.

MDA National also notes the PSR Committee process is costly, especially in view of the length of the hearings and number of attendees. We are aware of a recent hearing where the cost of the transcript alone was $14,500.

iii. Determining Authority.

The Determining Authority decides whether to ratify Negotiated Agreements reached between the Director of PSR and a practitioner, and determine what sanctions to apply whenever practitioners have been found to have engaged in inappropriate practice by a PSR Committee. MDA National notes that sanctions involving disqualification from claiming specific MBS Items are more likely to penalise patients rather than practitioners. For example, disqualification of a GP from Chronic Disease Management MBS Items penalises the GP's patients, in that these patients are unable to obtain Medicare benefits for management by allied health professionals to ensure their appropriate medical care. Rural patients can be further disadvantaged in the event that there are not alternative practitioners within close proximity.

Some of the repayments of Medicare benefits claimed are substantial; for example, in 2008-09 one practitioner was required to make a repayment of $1,202,872.40 and in 2009-10 another practitioner was required to repay $473,203.05. MDA National further notes that some practitioners have only received a percentage of the Medicare benefits, indeed in some cases we understand only 20%, and yet the practitioner is required to repay 100% of the MBS benefits. To date, MDA National is not aware that the PSR has prosecuted a person who is an officer of a body corporate who causes a person to engage in inappropriate practice, despite its ability to do so under the Act. We further note that repayments are required of the full amount of the Medicare benefit, rather than the difference between the benefit claimed and the benefit provided by the practitioner. This is despite the fact that the Act states that repayment of the "whole or part" of the Medicare benefit may be made. Again, this is an

area of substantial stress for practitioners and in one case MDA National is aware of the practitioner having to declare bankruptcy. MDA National submits that greater flexibility in the application of sanctions would be appropriate.

e. the appropriateness of the appeals process;

MDA National submits that the appeals process should be broadened to include some form of merits review in the Administrative Appeals Tribunal as is the case with other reviews of Commonwealth Regulatory bodies. In our view, this would increase the confidence of health professionals and the community in the PSR process.

f. any other related matter;

MDA National notes that demonstration at the PSR of documentary evidence of compliance with some of the MBS Item descriptors is difficult. For example, the GP Chronic Disease Management Items can be difficult to document to ensure compliance with the relevant descriptor, especially where consultation with other health or care providers must be set out as part of the treatment plan. Some other MBS Item descriptors also require very specific documentary evidence; for example, Item 132 requires a physician to prepare a management plan which should encompass a comprehensive patient history addressing "all aspects of the patient's health including psychosocial history, past clinically relevant medical history, any relevant pathology results if performed and a review of medication and interactions". The Item descriptor also requires the results of relevant assessments by other health professionals including relevant care plans or health assessments performed by GPs under the Chronic Disease Management Items. It is unlikely that a physician would have access to all of this information to include in a management plan back to the referring practitioner. MDA National submits there should be greater consultation with the profession in developing MBS Item descriptors and the associated explanatory notes, to ensure they are clear, appropriate and achievable. In addition, feedback should be sought from practicing health professionals and the PSR where problems are identified in MBS Items.

MDA National is also concerned by some of the disparaging comments made by the Director in his Report to the Professions. For example, the Director reviewed 136 practitioners in 2008-09, including 119 GPs. He appears to have extrapolated this limited experience to make broad statements about the actions of the medical profession in his Report to the Professions 2008-09 as follows:

In relation to CT scans, the Director states he is "alarmed at the number of these scans ordered without clinical justification". He notes that "the quality of other records kept by some specialists and consultants are poor", despite only 13 specialists being referred to the Director for

investigation in 2008-09. Based on such a small sample of practitioners, MDA National submits that it is difficult to see how the Director could justify these general statements about the medical profession. Indeed, we submit that these comments are unjustified and adversely affect the confidence of the community in the actions of medical practitioners.

In conclusion, MDA National supports the operation of the PSR in protecting the integrity of the MBS and PBS. In particular, we support the peer review process but we believe improvements can be made to ensure the process is fair, timely and transparent, particularly with respect to the use of independent expert medical evidence and greater legal input.

MDA National remains committed to working with our Members, the medical profession, the PSR and other stakeholders to ensure the objectives of the Scheme are met.

MDA National looks forward to participating in further discussion in relation to this issue, and we are happy to expand on any of these points, if this will assist the Committee with its deliberations.

Should you have any further questions in relation to this submission, contact should be made with:

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Yours sincerely

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