

Malcolm Watt



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Committee Secretary

Senate Standing Committee on Community Affairs

Parliament House

Canberra. ACT. 2600.

RE: Review of the Professional Services Review (PSR) Scheme
- submission by Malcolm WATT for consideration

Dear Honourable Members of the Committee,

1. I make this submission in a number of capacities : as a member of public; Medicare recipient; patient of several very good doctors; as a friend of numerous doctors who have aired concerns they have with the PSR system (the reason I am making this submission); and as someone who is able to freely speak without fear of persecution by the PSR (unlike most, if not all, of the 70+ doctors with whom I have widely consulted regarding this issue).

2. As a result of many conversations I have been involved in with many doctors (mostly GPs), I have researched the legislative basis for the creation, investigations and operation of the PSR. I am very familiar and proficient with interpreting legislation as a result of over a decade within the Queensland Police Service. I am also proficient with interpreting complex verdicts, identifying the ratio decidendi, and understanding the ramifications of same – including matters which have been finalised in Superior Courts.

3. I will state from the outset that I completely agree with the need for auditing of doctors' claims (as do ALL of the doctors with whom I have spoken), however just as accountability must be imposed on the doctors, so too does it have to be imposed on the PSR, or similar.

4. This submission will simplify and explain the logical reasoning behind many things, including:

- why massive degrees of change are urgently required and necessary;
- why such change must be significant enough to ensure the current organisational culture within the PSR cannot be transferred to an effective body, which needs to be created as a result of this Inquiry;
- how these changes will, in fact, be cost-effective for this and all future governments;
- the ramifications which this Senate leaves the Federal Government vulnerable to if this Inquiry fails to take immediate, decisive and dramatic action; and
- provide simple submissions with logical and legal procedures in order to achieve the desired outcomes.

5. My inquiries into the PSR started with elementary reference to their website.

Notwithstanding recent court cases that have gone against the PSR, the most recent I am aware of being in the Full Federal Court, NSW, on 28 July 2011 in *Kutlu v Director of Professional Services Review* [2011] FCAFC 94, however it was also extremely obvious that there were numerous other breaches of the legislation being committed as commonplace. (I do not intend to disclose these issues at this time, as I believe they will (if not already) provide legal grounds for further action in other matters.)

6. More disgraceful, however, is the *Health Insurance Amendment Act 2011*. Specifically, the gross invasion of privacy that destroys the doctor-patient confidentiality is appalling and will only have adverse effects on the community. As a priority, this must be amended to involve judicial authority for permission to access in cases which are all but proven – NOT for ‘fishing’ expeditions, or a weak attempt to allege insufficient note taking (yet there is no definition of “sufficient” note taking ?!)

7. When people are not guaranteed confidentiality, it is human nature to restrict information and/or conceal embarrassing or sensitive details. This is not in a patient’s best health interests. However, due to the intrusive nature of the PSR’s powers, people may now withhold certain details which may have, if known, afforded the treating doctor sufficient information to appropriately and effectively treat the underlying condition. In reality, concealed information may well result in further tests being required, referrals to other practitioners etc – all of which attract Medicare rebates/expenses.

8. I am positive this Senate Committee will hear more from other parties (such as the Queensland Council for Civil Liberties) about the privacy issue, and I sincerely hope you realise that you cannot overstate the disgust within the community. As the voting public are discovering this abhorrence, they are appalled.

9. However, the legislation and operations of the PSR are sub-standard in many more ways than just the invasion of privacy aspect. The biggest, most obvious flaws in the operations are the denial of procedural fairness. Legislation, investigative powers or procedures of this nature should NOT be accepted, tolerated or permitted within Australia – and I am sure will not be backed by the Superior Courts as more matters become resolved in such forums.

10. Another example of the totalitarian powers the PSR has adopted is the fact that ALL aspects of the audit, investigation, interview, review, hearing/appeal and sentencing are done under the banner of “PSR”. There is absolutely no genuine external agency involved; hence the Director of the PSR has a bias/vested interest in ALL matters. This, too, is in breach of ‘The Bias Rule’ and the ‘Appearance of Bias’ – per the Federal Government’s site, http://www.ag.gov.au/www/agd/agd.nsf/Page/Securityvetting_Whatarethepinciplesofnaturaljustice

11. As far as “agreements” or “settlements” are concerned, I ask this Committee to seriously consider whether or not the doctors involved entered their “settlements” of their own free will, or under duress or coercion. One must be mindful, of course, that the person under review (PUR) has almost invariably been told that any further action WILL cost them dearly. In Queensland State law, if a police officer asks someone to accompany them to the police station, then advises them that they’ll be arrested if they decline, then the person has been found to have acted under duress if they ‘voluntarily’ accompany the officer – I cannot see how this scenario differs. The PUR has responded under the threat of further action, hence “duress” or intimidation.

12. As I mentioned earlier, the appointment of Committee Members has already been examined in *Kutlu v Director of Professional Services Review* [2011] FCAFC 94, and resolved against the PSR. There are other avenues for other appellants to examine in the higher courts – and they are being advised to do so.

13. I accept that the inception of the PSR and original legislation started out in good faith and well-intentioned, however what has resulted from there has left a stain on the history of Australian privacy legislation and procedural fairness within investigations. Hence, a massive overhaul MUST occur to rid the system of the corruptive powers and restore faith, honour and lawfulness to the process.

14. As I have briefly explained a couple of aspects of the way the PSR conducts/operates itself in investigations, I am sure you will hear many more appalling actions first hand from doctors who have felt victimised/persecuted by the process.

15. In fact, I submit to you that the operational activities and methods of the PSR have polarised the medical profession from the PSR – the body with whom they are supposed to ‘information-share’. The actions of the PSR have created such an adversarial relationship between the parties that there is no other logical consequence : conflict, not co-operation.

16. For this reason, and similar to the reasons why the legislation needs to be amended/repealed/replaced, I also submit to you that the investigative and operational procedures employed by the PSR MUST also be overhauled.

17. To overhaul the operations and procedures of PSR investigations does not need to be a difficult, complex or unique set of guidelines. Given the nature of their work, and the likelihood of matters being contested, and ultimately ending up in court, the logical and obvious implications are for the investigators to follow established legal protocols such as Judges Rules, Natural Justice, Rule of Bias, admissibility of evidence and so forth.

18. Naturally, I realise the first response to the suggestion of change is resistance, however a quick, albeit superficial, review of the performance and perception of the PSR may assist. The PSR does not get, nor deserve, assistance, cooperation and/or respect from the doctors they are auditing. As a direct result, their auditing processes have been modified in a draconian fashion in order to compel information be passed over. The chances of a successful, unbiased, fair outcome in a situation where conflict is inevitable are minimal.

19. The mere fact that 56 of the last 56 cases that have been determined before the PSR Committee have ALL been found in favour of the PSR does not mean the system works. On the contrary, it signifies the system may be irreparably dysfunctional and lopsided. The fact that the PSR can “hear evidence as it sees fit” (direct quote from legislation/policies from their PSR website) has been met with unjust consequences (a review of Dr A. S. Reece’s court documents prove this – as commented upon by the presiding judge). This has been taken by the PSR to mean that they can ignore, discard or omit defence evidence by a PUR, or even an expert they present as part of their defence. These are just a couple of cursory issues that are symbolic of an inherent, systemic abuse of process and power.

20. So rife is the arrogance, abuse of power, dereliction of obligations and complacency for regulations and so prolific is its occurrence, that the Minister (at least in successive 2005, 2008 governments) has not even adhered to their responsibilities – nor the senior executive of the PSR. Whilst many may argue this point, I refer this Inquiry to the findings and comments in *Kutlu v Director of Professional Services Review* [2011] FCAFC 94 as proof. I would also point out that paragraph 102 of this verdict indicates the Director had directly mislead the Court – the PSR does not ‘play by ANY rules’ – even in the Federal Court !

21. As stated earlier, this level of arrogance and autonomy cannot be allowed to continue. It must be eradicated by any and all means necessary. The organisational culture of the PSR must not be permitted, by person or planning, to transfer to a lawfully operating, functioning, accountable body designed to effectively audit the doctors’ Medicare claims.

22. Whilst paragraph 21 may seem extreme, I submit that so too are the clear, unambiguous words used in the findings of the aforementioned case (ie *Kutlu*) – and the subsequent ramifications of same (which, at this point in time remain to be seen, but the magnitude and severity of them will be elaborated on shortly).

23. In terms of “planning” as referred to in paragraph 21, I submit that the planning of new appropriate, sufficient, balanced, lawful legislation must be conducted in consultation with as many stakeholders as possible. Consultation on legislation and operations MUST include many more organisations, groups and individuals than merely the Australian Medical Association (AMA) – whose senior management stood to gain/benefit from the formation of the PSR and the skewed practices developed within the PSR. (Were they not the majority of people appointed on Committee’s and/or Determining Authorities ? Did they receive remuneration for such roles ?)

24. Furthermore, input should also be sought from police officers, forensic accountants, barristers and solicitors to establish due process, procedural fairness/natural justice, negate the Rule of Bias, comply with the Judges Rules and rules of admissibility of evidence etc. The investigating body must only be allowed to use lawful and ethical practices in order to obtain evidence.

25. Another aspect that should be incorporated involves having separate investigators, prosecutors and adjudicators – not all from under the single banner, at present the PSR. This could instantly negate any defence or argument surrounding bias issues.

26. By conducting the investigation 'properly', matters of clear deception and/or fraud could then easily (and inexpensively so far as the Federal Government is concerned) be referred to police for criminal proceedings, whereby all previously obtained evidence is admissible.

27. Whilst it has already been acknowledged that the changes proposed in this submission will cost money to materialise, there are a few simple facts which prove that this money NEEDS to be spent AS A COST-SAVING EXERCISE, if nothing else. FACT – because of the arrogance and inattention/neglect of details/procedures, the Full Federal Court, on 28 July 2011, awarded a substantial amount of costs (associated with legal proceedings) against the Federal Government, via the PSR. FACT - the wording in the verdict handed down in Kutlu v Director of Professional Services Review [2011] FCAFC 94 is so strong that there are clearly going to be other ramifications as a result of it. FACT – many doctors who have been persecuted by the PSR since 2000 ARE looking at their legal options, secure in the knowledge that the precedent has now been set, and costs will likely go against the PSR in all other similar matters they fail to resolve without court intervention. FACT – many doctors ARE already exploring other legal options available to them in regards to seeking much, much more money from the flawed PSR. FACT – more doctors WILL be successful (it may only be 'forecast' at this stage, but you watch it materialise into fact as other proceedings reach the verdict/s !)

28. I submit to you that the current PSR has no faith or respect to lose; the current PSR has no goodwill to forfeit; the current PSR has no legal credibility; the current PSR has unlawfully convened many, if not all, Committees for many years; the current PSR will now become a litigant lawyer's paradise; the current PSR will have no way of stopping other PURs similarly proving their Committee had unlawfully been established/convened; the current PSR will be ordered to pay costs for many other PURs cum Appellants; the current PSR is now vulnerable to innumerable court cases, fees and costs – with no real or substantive benefit to the taxpayers of Australia.

29. Aside from the snowball that has been set in motion regarding the establishment of PSR Committees, the PSR is also open for further court action as a result of the clear, unambiguous wording of the Kutlu judgment – claims such as pain, suffering, damage to reputation, loss of quality of life, loss of income etc etc etc and all from an unlawfully structured mechanism ?!

30. Notwithstanding the sizeable claims that could, and will in my opinion, be brought against the PSR for reasons discussed in paragraph 29, but I also understand the family and legal representatives of Dr Peter Tisdall may also have grounds to take action, albeit posthumously on the doctor's behalf. Perhaps the Senate Committee could take the time to see the approximately 1500 people (reference the "RIP dr Tisdall" Facebook site) who have rallied to show their support, admiration and respect for the doctor since his passing on 26 June 2011 – and about 15 years into disputes with the PSR ! Why have they persecuted and defamed (by taking out advertisements in local papers) a dedicated doctor who clearly provided his community with the care, support and time that they needed and/or deserved?

31. Or is the problem also that the current PSR cannot distinguish between a doctor robbing Medicare and a doctor simply misinterpreting the Medicare Benefits Schedule ? Medicare itself bases investigating doctors purely on statistical anomalies. This has never been proved to be an effective way of detecting "inappropriate practice" and needs to be rethought. In any case, just because a doctor's claims are a "statistical anomaly" that does NOT equate to "inappropriate practice" in any world, other than the justification-seeking PSR.

32. Again, notwithstanding previously mentioned claims that will soon be made against the PSR, doctors who have been coerced into making repayments to Medicare may now also become entitled to have those repayments reimbursed. The body which forced them to make the repayments had been illegally convened/established, hence (per Kutlu v Director of Professional Services Review [2011] FCAFC 94) all subsequent resultant actions become null and void. Added with the circumstance of duress/coercion, the cases are clear-cut !

33. I submit that this Senate Inquiry Committee needs to direct a way to be negotiated such that PURs who fall into this category can now re-negotiate new "settlements", or agreements whereby the PURs are satisfied with the outcome. I also submit that failure to do so will have two consequences : 1. Court action will be taken and the Federal Government will be substantially more 'out of pocket'; and 2. Good doctors will either leave the profession, take early retirement or stop bulk-billing (especially in remote and/or minority/ethnic group regions). I have heard talk of this being planned by some, if this Committee cannot take the required action and to the required extent.

34. I submit to you that these arguments have demonstrated the real, urgent need for change. I also submit that the longer this system is allowed to operate in such an unethical and unjust manner, the more claims there will be, the more court cases they'll lose etc etc

35. I submit that these reasons, apart from the moral, ethical and legal arguments JUSTIFY a complete overhaul of the entire process. Any expense incurred will be more than made up for in savings in the future. That is, stop losing court cases, stop having to pay others' legal costs, stop having the repay 'fines', stop having to pay punitive damages and there will be obvious savings ! Develop and employ strategies and change mechanisms immediately and stop handing out money. The "change" will start paying for itself from Day One. The critical question for this Senate Committee is not "Should we spend money on a change?", but "Can we afford the consequences of not changing ?".

36. "Change" does not mean for a second rescinding any or all rights to audit doctors' claims. That is not what I, the doctors I am liaising with, or the general public want to see happening. There should be no amnesty period, despite there not being a body in place at the time to conduct the audits. New legislation, when formulated correctly and with appropriate consultation and input from as many stakeholders as possible, should be made retrospective, such that the legislation can be enforced back to the same date that the old, flawed Act/Regulations is repealed.

37. No doctor I know wants there to be “no accountability”. On the contrary, not only do they insist doctors must be accountable for their actions, but so too must the body who audits and investigates the doctors. I do not consider that too much to ask.

38. In fact, what the doctors I know are trying to protect and preserve include things like: bulk-billing; health services, particularly GPs available for people in rural areas (for example, Kyabram); doctors to be able to conduct their business/es in peace, and without fear of persecution, bullying, intimidation, harassment or defamation (the effects of these issues will also be discussed shortly); and they also want to utilise their knowledge and skills to best serve their patients – if that means the GP orders/conducts some tests to save their patient time/money with referral/waiting time to specialists, then I am here to tell you that that is exactly what patients want ! Furthermore, it is cheaper than referring for same.

39. In terms of retaining bulk-billing, many doctors are now considering ceasing the practice, as it only attracts more PSR attention to them. They will have more patients wanting to see them. More patients equates to more Medicare codes. More Medicare codes equates to a statistical anomaly. Statistical anomalies equate to irregularities when Medicare ‘screens’ clinics. This then introduces the corrupted practices of the PSR, which in turn introduces “audit anxiety” – to be discussed shortly.

40. The use of “statistical anomalies” may well be an appropriate use of technology to screen large volumes of data expeditiously, however common sense must also be applied. Future applications need to take into consideration certain significant factors – such as the profile of the practice. That is, a rural doctor with no other doctors for several hours around (such as the late Dr Tisdall, Kyabram) will see all manner of patients – possibly in high, seasonal volumes; a doctor who specialises in one particular aspect (such as Dr Masters, Caloundra) will process more claims of that nature than usual – people are travelling to that doctor for THAT treatment, not a regulation consultation; a doctor who converses with minority groups (such as Dr Waluk) will have very high volumes of ethnic patients, many of whom will also travel vast distances to see ‘their’ doctor; if a doctor/practice utilises their own knowledge, skills and resources to perform the required tests there (instead of referring the patient elsewhere, where they have to wait for an appointment, start the history again, then pay an unnecessary gap) – they will have ‘unusual’ claims statistics. Broad consultation in the development of the current model would have identified these issues before they became major legal issues, or even the subject of PSR attention.

41. Prior to the introduction of the use of “statistical anomalies” being the screening tool, was any research done to show that doctors identified by “statistical anomaly” were more likely to commit fraud than someone who hid in the middle of the pack ? Perhaps instead, it indicates the doctor/practice may fall into one of the above mentioned categories ? Is there any evidence to link fraud with “statistical anomaly” (no, I don’t care to hear the PSR’s crucifixion, I mean prosecution/conviction, rate. I mean “lawful”, credible evidence)

42. Discouraging doctors from bulk-billing and discouraging doctors from using their full skill sets will soon prove to be very counter-productive to the country. As an ageing population, you must accept that means more people will have more medical conditions and need to see more doctors (not less – stop them from leaving the profession).

43. As mentioned in paragraph 39, there are adverse health effects being suffered as a result of the performance and operational tactics of the PSR. Such is the extent of the problem that a study is now being conducted into the nature, effect, symptoms and effects of the PURs’ health and productivity. (that is, “audit anxiety” as per *Medical Observer*, 29 July 2011, Page 3)

44. One would think that any governance of the health industry would be mindful of health issues, yet the PSR under its inherent guidance by the AMA have overlooked such ‘trivialities’. How could the AMA do that ? Greed or neglect ? Is either better/acceptable?

45. The AMA has, by whatever reason or method, placed itself (as an organisation) in an untenable position. On the one hand they advertise that they represent doctors’ interests, but on the other hand they sit on the illegal Committees that coerce money from the doctors. I will leave it to the Senate Inquiry Committee members to examine the founding issues, members and so on; and to draw their own inferences on who became involved and at what point, or under whose recommendation/guidance/sponsorship. (I also think the AMA needs to have a good look at itself, its positions and its responsibilities – the AMA must choose which side of the fence they sit on – or perhaps it’s just an over-ambitious few who need to self-assess ?!) I understand the ACCC have also been asked to look into the aforementioned alleged breach of the *Trade Practices Act*.

46. This submission has clearly, categorically and comprehensively demonstrated how the PSR is failing in its objectives (notwithstanding the fact that they have NEVER recouped even their own budget, let alone 'recovered' more money for Medicare ! – but I'm certain your inspection of the REAL figures (not just the 'take home' pay scales, the full remuneration packages) will show you what I am referring to.)

47. This submission has also demonstrated how and why the PSR has developed such an autonomic organisational culture that it refuses to operate within the parameters of the law – as evidenced in *Kutlu v Director of Professional Services Review* [2011] FCAFC 94.

48. This submission has clearly identified and indicated the subsequent ramifications of the Kutlu case, and the associated costs and consequences.

49. This submission has demonstrated why the legislation, the structure, the organisation and operations of the PSR have failed and MUST be completely overhauled.

50. This submission has given practical advice with whom to consult, and what principles must be maintained when new legislation and/or governing body is developed.

51. This submission has demonstrated that any costs outlaid in the establishment of such new entities will, in fact, serve to save the Federal Government – in the short, medium and long terms.

52. As a member of the public I want bulk-billing to continue to be available to the needy. As a patient I want confidentiality between doctors and their patients and I want my doctor to be healthy and focussed on their patients – not distracted or afflicted because of PSR bullying. As a former (medically retired) police officer I am astounded at the fascist tactics the PSR have been using, without repercussions. As someone who achieved to a High Distinction level in Legal Studies for QUT at Senior Sergeant level, I was able to identify to others where legislative requirements and obligations (would) have been ignored/disobeyed – thereby creating grounds for Superior Court challenges if required. As a group member involving over 70 doctors, I am appalled at the devastating manner which the Federal Government has treated the medical fraternity. As a taxpayer of Australia I definitely want all claims to Medicare to be able to be fully scrutinised, however natural justice must be accommodated. As someone who has provided a submission to this Inquiry, I sincerely hope each and every member of the Committee fulfils their obligations to the Australian people and takes the appropriate, necessary action.

53. This submission has been provided without prejudice, bias or self-promotion or gain.

54. I am willing to appear before the Senate Committee Inquiry into the PSR should the members wish to discuss any of these issues further, or have me provide further insights and/or information.

Yours truly,

Malcolm Watt