



PROFESSIONAL SERVICES REVIEW

COMMITTEE HANDBOOK
for
PSR PANEL MEMBERS
and
DEPUTY DIRECTORS

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Preface

This Handbook is intended to help members of Professional Services Review (PSR) Committees to perform their role under Part VAA of the *Health Insurance Act 1973* (the Act). That Part sets up the PSR Scheme.

The Handbook aims to provide comprehensive procedural guidelines, operational protocols and practical advice to assist PSR Committees. This should help Committees conduct investigations, hold hearings, address submissions from the person under review (PUR) and prepare reports.

This edition of the Handbook takes account of Federal Court and other judicial comment which is relevant to the scheme. **The Handbook is not a substitute for the legislation.** If a Committee is unsure about any procedural or operational matter, it should **check the Act and regulations** and, if necessary, seek legal advice after it has consulted with the PSR Case Manager assigned to the case.

The Handbook is a document to which section 9 of the *Freedom of Information Act 1982* (Cth) applies. It is available for members of the public to inspect and purchase.

When using this Handbook, references to sections of legislation (such as the example shown below) refer to the *Health Insurance Act 1973* (as amended) unless otherwise stated.

[s 3]

Glossary

The following abbreviations are used in this Handbook:

Act	<i>Health Insurance Act 1973 (Cth)</i>
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977 (Cth)</i>
Committee	Professional Services Review Committee
DA	Determining Authority
Director	Director of Professional Services Review
Director's Review	conducted pursuant to section 88A of the Act
Medicare Request	the request made under section 86 of the Act by Medicare Australia for the Director to conduct a review
PSR	Professional Services Review
PUR	person under review
Referral	a referral to a Committee by the Director pursuant to section 93 of the Act
Review period	the period specified in the Medicare Request.

1 Chapter 1: Overview and Structure of the PSR Scheme

1.1 What is Inappropriate Practice?

- 1.1.1 The PSR Scheme, established by the Act, is aimed at dealing with inappropriate practice in connection with the Medicare program and the prescribing of pharmaceutical benefits under the Pharmaceutical Benefits Scheme (PBS).
- 1.1.2 Under the PSR Scheme, an individual health practitioner's conduct may be examined, by the practitioner's peers, if inappropriate practice is suspected in connection with:
- (a) rendering or initiating services which attract Medicare benefits; or
 - (b) prescribing under the PBS.
- 1.1.3 A practitioner engages in inappropriate practice if the practitioner's conduct, in connection with the provision of services, is such that a Committee could reasonably conclude that the **conduct would be unacceptable to the general body of the practitioner's peers**. In reaching that conclusion, the Committee must have regard (as well as to other relevant matters) to whether or not the practitioner kept adequate and contemporaneous records of the rendering or initiation of the services. Inappropriate practice is defined in section 82 of the Act. [s 82(3)]
- 1.1.4 The regulations prescribing standards for keeping adequate and contemporaneous records are included in Appendix 6: Regulations. In the Federal Court decision of *Saint v Holmes*, the Court rejected the PUR's submission that a Committee would not find the applicant had practised inappropriately on the sole basis of his inadequate records.

1.2 Steps in the PSR Scheme

Medicare Australia Request to Review the Provision of Services

- 1.2.1 Medicare Australia may request the Director to review the provision of services by a person during a specified period.[s 86(1)]
- 1.2.2 The period specified must be within 2 years immediately preceding the request. The request must include reasons.[s 86 (2), (3)]
- 1.2.3 Medicare Australia must give the person written notice of the request within 7 days of making the request. [s 87]

The Director's Review

- 1.2.4 The Director may request further information (details of patients receiving services) from Medicare Australia to assist in making a decision whether to conduct a review, or for conducting the review. The Director has 1 month from receipt of the Medicare Request to make this decision. [s 88 and s 88A]
- 1.2.5 The **Director must undertake a review** if, after considering the Medicare Request and any other relevant material, it appears to the Director that there is a possibility that the person has engaged in inappropriate practice in providing services during the review period. The Director must notify the person and Medicare Australia of the decision to undertake a review.
- 1.2.6 The person must also be provided with information about the Directors power to request medical records and other relevant documents under section 89B at this time. [s 88A]

- 1.2.7 If the Director decides not to undertake a review, the person and Medicare Australia will be notified accordingly. The notice given to Medicare Australia must also include the grounds for the Director's decision. [s 88A(8)]
- 1.2.8 Where documents are required to be produced, the PUR will be notified of the consequences of failing to produce them. These are that services rendered or initiated by the PUR will not attract a Medicare benefit (s 106ZPM). Refusal or failure to comply with a notice by a person other than the person under review is an offence (s 106ZPN).
- 1.2.9 The Director may review any or all of the services provided by the PUR during the review period, may undertake the review in whatever manner is thought appropriate and is not limited by the reasons in the Medicare Australia Request. [s 88B and 89]

Director's action following the Review

- 1.2.10 After the Director's review of the provision of services by the PUR, the Director must either:
- decide to take no further action under section 91; or
 - give the PUR a report explaining why the Director has not proceeded under section 91 and invite them to make written submissions (within 1 month) about the action the Director should take in relation to the review.
- 1.2.11 As soon as practicable after taking into account any submissions received, the Director must decide whether to:
- **take no further action** in relation to the review under section 91; or
 - **enter into an agreement** with the PUR under section 92; or
 - **make a referral** to a Committee under section 93.[s 89C]
- 1.2.12 The Director has 12 months from making the decision to conduct a review to decide whether to take no further action on the review, enter into an agreement with the PUR or refer the matter to a Committee. If the Director has not taken any of those steps **within 12 months**, the review will lapse. The 12 month period can be extended in some circumstances, including where there is an injunction or other court order suspending the review.[s 94]

Taking no further action

- 1.2.13 To take **no further action** on a review under section 91, the Director must be satisfied that:
- there are insufficient grounds on which a Committee could reasonably find that the PUR has engaged in inappropriate practice when providing services during the review period; or
 - circumstances exist that would make a proper investigation by a Committee impossible.
- [s 91(1)]
- 1.2.14 Within seven days of deciding to take no further action on a review, the Director must give Medicare Australia and the PUR written notice of the decision. The Director must also provide them with a report setting out the grounds for that decision.[s 91]

Entering into an Agreement and its consequences

- 1.2.15 The Director and the PUR can enter into a written **agreement** under which the PUR acknowledges that they engaged in inappropriate practice in connection with rendering or initiating specified services during the review period. If the PUR does this, the agreement will include the action that will be taken in relation to them. This may include a reprimand, repayment of amounts equal to Medicare benefits paid, suspension of authority to prescribe under the *National Health Act 1953* and partial or full disqualification from rendering or initiating services that attract a Medicare benefit for up to 3 years.[s 92]

- 1.2.16 Any such agreement must be ratified by the Determining Authority (DA) to take effect. If the agreement is not ratified by the DA, the Director has 3 months from DA refusal to ratify to decide to:
- take no further action in relation to the review under section 91; or
 - enter into a further agreement with the PUR; or
 - make a referral to a Committee under section 93.
- 1.2.17 If the Director has not made a decision by the end of those 3 months, the Director is required to make a referral to a Committee.[s 92A]
- 1.2.18 The Director must not disclose to any Panel member (other than a Panel member the Director may have consulted to obtain assistance in making a decision) whether any communications between the PUR and the Director concerning a proposed agreement has taken place. This restriction applies even if the agreement is not ratified by the DA and the matter is then referred to a Committee. Panel members consulted by the Director in this way cannot be appointed as a Committee member in respect of the PUR that was the subject of the consultation.
- [s 92(6) and s 95(8)]

Referral to a Committee

- 1.2.19 If the Director decides to take further action in relation to the review and does not enter into an agreement with the PUR, the Director must set up a Committee and make a **referral** to it.
- [s 93 and s 89C]
- 1.2.20 The Committee's task is to investigate whether the PUR engaged in inappropriate practice in providing the services **specified in the referral**. [s 93(1)]
- 1.2.21 The referral must attach a Director's report to the Committee about the services to which the referral relates, giving the reasons why the Director thinks the PUR may have engaged in inappropriate practice. [s 93(6)]
- 1.2.22 A copy of the referral and Director's report must be forwarded to the PUR and Medicare Australia within 7 days of making the referral. The copy provided to the PUR must also set out the terms of the sections dealing with notice of hearings (s102), the Committee's process and its findings (s106H) and sampling (s106K). [s 93(7), (7A)]

Constitution of Committees

- 1.2.23 Committees consist of members appointed by the Director, including a Chairperson who is a Deputy Director of PSR and two other Panel members. The Director can appoint two additional panel members to give a Committee a wider range of clinical expertise. [s 95(1)]
- 1.2.24 Where the PUR is the practitioner who rendered or initiated all of the referred services, the Chairperson and each of the Panel members must be practitioners who belong to the same profession in which the PUR was practising during the referral period. If the PUR was a general practitioner, the Panel members must also be general practitioners. If the PUR is a consultant physician or a specialist, the Panel members must also be consultant physicians or specialists in that area of practice. [s 95(2)- (7)]
- 1.2.25 The PUR may challenge the appointment of a Committee member or members on the grounds of actual or perceived bias. If the Director decides that the challenge is justified, the appointment of the relevant Committee member will be revoked and a replacement appointed. Do not be overly concerned if a challenge is made to your appointment. It is for the Director to make a decision about the merits of the challenge. [s 96(3)]

- 1.2.26 The Act also makes provision for the appointment of replacement Committee members in some situations, such as when a Committee member becomes ill (but only prior to the Committee commencing its investigation), or for another Committee to be set up. [s 96A]

Meetings of the Committee

- 1.2.27 The Chairperson must convene the first meeting of the Committee **within 14 days** of the Committee members being appointed. However, failure to hold the first meeting within 14 days will not render the actions of the Committee invalid. If there is a challenge to the appointment of a Committee member, the 14 day period does not commence until the appointment of a new member or the Director's decision in relation to the challenge.
- 1.2.28 Meetings must be held in private. The Committee can regulate the proceedings of its meetings, and inform itself, as it thinks fit. The members need not meet in person, a teleconference or video conference is sufficient. [s 97 and 98]
- 1.2.29 Procedurally, the Chair should preside over all meetings. In the absence of the Chair, another member can be elected to preside. The quorum for a Committee meeting is a majority of members. Questions arising during meetings are to be decided by a majority of votes from members present and voting. [s 99]
- 1.2.30 The purpose of initial meetings is to identify any areas where the Committee Members consider the PUR may have engaged in inappropriate practice, identify areas of uncertainty where further clarification may be required by the PUR, devise questions to be asked of the PUR and share the responsibility for investigating different services.
- 1.2.31 If the Case Manager has identified that the PUR may have language difficulties this is the time to assess whether an interpreter should be arranged. This is particularly important where the PUR is not legally represented.

Services to be examined

- 1.2.32 The Committee is not limited to examining the services reviewed by the Director. Rather, it can examine any services rendered or initiated by the PUR **during the review period**. [s 106H]
- 1.2.33 At times, PUR's have objected to the Committee examining different types of services to those reviewed by the Director. In the case of *Thoo v Professional Services Committee*, Justice Lindgren rejected the PUR's challenge to the Committee's actions in reviewing services different from those examined by the Director and said that the Act is clear on this point.

Referral of concerns to the Director

- 1.2.34 There are three scenarios in which the Committee must notify the Director about its concerns regarding the PUR. Ideally, the nature of the concern should be stipulated with reference to the relevant section of the Act. This is because there are different implications for where the Director refers the information depending on the Committee's concerns.
- 1.2.35 Firstly, if the Committee becomes aware of any matter that it considers to be a **concern to the profession**, the Committee **must** notify the Director in writing so the matter may be considered by Medicare Australia or another appropriate body. [s106KC]
- 1.2.36 This provision has resulted in referrals to a State Health Department when the Committee had grave concerns that some of the PUR's patients may have significant health risks. It is an important provision for the Committee to remember especially if it considers some action should be taken urgently.
- 1.2.37 Secondly, if a Committee considers that conduct by a PUR has caused, is causing or is likely to cause, a **significant threat to the life or health of any person**, the Committee **must** give the Director a written statement of its concerns and the material on which the opinion is based. The

Director must forward this information to the body that, in the State or Territory in which the practitioner practises his or her practice or speciality or renders or initiates referred services, is responsible for registering or licensing practitioners for practice in the profession or speciality to which the practitioner belongs or is responsible for regulating the practice of that profession or speciality and has the power to take action against the practitioner.

[s106XA]

- 1.2.38 Thirdly, if the Committee believes that the PUR has **not complied with professional standards**, the Committee **must** notify the Director and give details of the matter about which they are concerned. The Director must then forward this information to a body nominated in the regulations. The regulations refer to the relevant State medical boards, professional colleges, the Australian General Practice Accreditation Limited (AGPAL) and Quality Practice Accreditation Pty Ltd.[s106XB]
- 1.2.39 If a Committee is not certain that any initial concerns warrant referral to the Director it can delay this until after the hearing.

Committee hearings

- 1.2.40 When an investigation has been referred to a Committee, the Committee must hold a hearing if it considers that the PUR may have engaged in inappropriate practice. Written notice of the time and place proposed for the hearing must be given to the PUR at **least 14 days** before the proposed hearing day. The notice must give particulars of the referred services to which the hearing relates and may require that the PUR appear at the hearing and give evidence to the Committee.
[s 101 and 102]
- 1.2.41 Chapter 4 of this Guide gives further information about the procedure at Committee hearings.

Rights of persons under review at hearings

- 1.2.42 Subject to any reasonable limitations or restrictions the Committee may impose, the PUR may:
- (c) attend the hearing;
 - (d) be accompanied by a lawyer and/or another adviser;
 - (e) call witnesses to give evidence (other than evidence as to his or her character);
 - (f) produce written statements as to his or her character;
 - (g) question a person giving evidence at the hearing;
 - (h) address the Committee on questions of law arising during the hearing; and
 - (i) after the conclusion of the taking of evidence make a final address to the Committee on questions of law, the conduct of the hearing and the merits of the matters to which the hearing relates.[s 103(1)]
- 1.2.43 If a lawyer accompanies the PUR, the lawyer may, subject to any reasonable limitations or restrictions imposed by the Committee:
- (j) give advice to the PUR;
 - (k) address the Committee on questions of law arising during the hearing; and
 - (l) after the taking of evidence, make a final address to the Committee on questions of law, the conduct of the hearing and the merits of the matters to which the hearing relates.[s 103(2)]
- 1.2.44 The PUR may be accompanied by a person other than a lawyer. If the PUR is accompanied by both a lawyer and a non-legal adviser, either one can make the final address to the Committee but **not both**. [s 103 (4)]

Unrepresented PURs

- 1.2.45 When a PUR is unrepresented, the Committee should take all steps to ensure the PUR understands what is occurring and seeks an adjournment if they appear to be confused or distressed.
- 1.2.46 If a PUR concedes that they have practised inappropriately in relation to a service, the Committee should ensure that the transcript records that the Committee has asked the PUR if they understand the implications of this admission, including the possible consequences and that this will be noted in the Committee's Report. The PUR should also be asked if they need a break to consider this further. This is even more important if the PUR concedes that a whole list contains inappropriate services. Taking this step will help ensure PUR understands the consequences of their admissions and has sufficient time to consider the implications of these admissions.

Obligation of PUR to appear

- 1.2.47 The notice of hearing given to the PUR should require the PUR to appear at the hearing and give evidence. If, having been required to do so, the PUR fails to appear at the hearing, or appears but refuses or fails to give evidence or to answer a question, the Committee can notify the Director of the PUR's failure.[s 104(1), (2)]
- 1.2.48 Having notified the Director, the Committee can either proceed with the hearing or it may propose to hold another hearing to take evidence from the PUR (effectively giving the PUR another opportunity to comply a new hearing notice). If the PUR subsequently appears and answers every question put to them by the Committee, then the Committee must inform the Director that the PUR has appeared, given evidence and answered questions (as required). In that event the power of the Committee to proceed with the hearing without the PUR ceases to apply and the PUR ceases to be disqualified. [s 104(4)]
- 1.2.49 The PUR may be excused from failing to appear at a hearing or failing/refusing to give evidence or answer questions if the PUR has notified the Committee prior to the hearing and proper medical grounds are established. The Committee has the power to require the PUR to undergo a medical examination to establish the existence and extent of any medical condition.[s 104(5)]
- 1.2.50 The PUR has the right to refuse to answer questions on the ground that the answer to the question might tend to incriminate them and the Committee believes that the answer might tend to do so. [s 104(6)]
- 1.2.51 If the Committee informs the Director that the PUR has failed to appear at a hearing, or has failed to give evidence or answer questions, the Director must disqualify the PUR from the Medicare program and inform Medicare Australia of this action. If the Committee informs the Director that the PUR has appeared and given evidence and answered questions (as required), then the Director must revoke that disqualification and inform Medicare Australia in writing of the revocation. [s 105]

Producing records

- 1.2.52 The Committee may, at any time before or during a hearing, issue a notice to the PUR, or to any other person whom the Committee believes to have possession, custody or control of patient records or other documents, requiring them to be produced to the Committee. A Committee member must sign the notice. The notice must give **at least 14 days** to comply. When documents are produced, the Committee can inspect them, retain them for a reasonable period and make copies. [s 105A]
- 1.2.53 If the PUR intentionally refuses or fails to produce the documents within the period specified in the notice, the Committee can proceed with the investigation and inform the Director. The Director must notify Medicare Australia that the PUR is disqualified. If someone other than a

PUR intentionally refuses or fails to comply with a notice under section 105A, they can be prosecuted for an offence.[s 106ZPM, 106ZPN]

Procedure at hearings

- 1.2.54 The Committee will hold a hearing. The procedure the Committee follows is within the discretion of the member presiding. The Committee is not bound by the rules of evidence and can inform itself on any matter in any way it thinks appropriate.[s 106]
- 1.2.55 Evidence at a hearing can be taken on oath or affirmation which can be administered by any of the Committee members. [s 106A]
- 1.2.56 The Committee can issue a summons to a person, other than the PUR, requiring that person to appear at the hearing to give evidence and produce documents. A person summoned to appear before a Committee is entitled to be paid an allowance in accordance with the regulations for their attendance. This entitlement does not apply to the PUR.[s 106B and s 106C]
- 1.2.57 A person served with a summons who fails to attend, without reasonable excuse, commits an offence.[s 106D]
- 1.2.58 A person, other than the PUR, who appears as a witness at a hearing can be prosecuted for refusing or failing to:
- (m) be sworn or make an affirmation;
 - (n) answer a question required by a Committee member; or
 - (o) produce a document that they are required to produce.[s 106E]
- 1.2.59 A person who obstructs or hinders a Committee or disrupts a hearing commits an offence.[s 106EA]

Committee findings

- 1.2.60 The Committee can make findings only in respect of services specified in the referral. Committees must work within this limitation.
- 1.2.61 As noted, under subsection 106H(3) the Committee's investigation is not limited by the reasons or anything else in the Director's report to the Committee or by any request under section 86 (from Medicare Australia). That is, the Committee is able to investigate other matters related to the referred services, not previously identified, which arise during the course of its investigation of the referred services. These 'other matters' must still relate to whether there has been inappropriate practice in relation to the provision of services that have generated a Medicare or (Pharmaceutical Benefits Schedule) PBS benefit being paid.
- 1.2.62 Although the Committee cannot make findings except in respect of the referred services, if it appears to the Committee that the PUR may have engaged in inappropriate practice in the provision of services that fall outside the scope of the referral, the Committee can request the Director to review the provision of those services. [s 106J]

Methods for considering conduct - including sampling

- 1.2.63 One approach the Committee can take in determining whether there has been inappropriate practice and the extent of inappropriate practice is to examine a sample of services. [s 106K]
- 1.2.64 A Committee can request a sample based on a theme, such as a particular drug, a kind of service or the location at which the service was provided. The sampling methodology the Committee uses must be either specified in a determination by the Minister or approved by an accredited statistician.
- 1.2.65 If the sampling determination is being used, it is important that once the Committee receives a random sample of records, each service is carefully reviewed. If the services are not reviewed

there is a risk that the records may not be complete, with the flow on result that the sample is inadequate. This has significant implications for the findings the Committee can make and subsequently, the sanctions the DA can impose.

- 1.2.66 The Health Insurance (Professional Services Review – Sampling Methodology) Determination 2006 specifies at section 7 that a minimum of 25 randomly selected services can make up a sample.
- 1.2.67 Another way the Committee may proceed is to rely on ‘the deeming provision’, relating to a prescribed pattern of services, in section 106KA. Together with Regulation 10, this section deems that a practitioner has practiced inappropriately if, during a 12 month period, they render 80 or more professional attendances on 20 different days. Referrals made under section 106KA, commonly known as 80/20 referrals, are outlined in more detail at Chapter 2. [s 106KA]
- 1.2.68 If the clinical or practice records of the PUR are missing, inadequate, illegible or otherwise incomprehensible, and it is impossible for the Committee to conduct an inquiry based on statistical sampling or patterns of services, the Committee can make a generic finding of inappropriate practice. This can be based on any information that it is able to obtain, including information supplied by Medicare Australia, contained in the report by the Director or given in evidence at hearings held by the Committee. If this action is taken, the DA cannot impose any sanctions which involve the repayment of Medicare benefits. [s 106KB]

Criminal and Civil Offences

- 1.2.69 If the Committee suspects the PUR has committed a relevant offence or relevant civil contravention against the Commonwealth in relation to the referred services, it can send relevant material to the Director for referral to Medicare Australia for investigation but may otherwise continue with its consideration of the referral.[s 106N]

Reporting by the Committee

- 1.2.70 At the close of the hearing and while the Committee is preparing its draft report, the Committee can choose to invite the PUR to provide the Committee (within a specified timeframe) further information the PUR wishes be taken into account.
- 1.2.71 The Committee will prepare a draft report of its preliminary findings setting out its reasons for those findings. A copy of the draft report must be given to the PUR, with an invitation to make submissions suggesting changes to the draft report.
- 1.2.72 The PUR may, **within 1 month after the day they receive the draft report**, make submissions in relation to the draft report. The Committee must consider those submissions. [s 106KD(3)]
- 1.2.73 If the **draft report of all or a majority of members does not contain a finding of inappropriate practice**, the draft report will become the final report of the Committee and will be distributed to the PUR, the Director and Medicare Australia. A notice must also be provided with the report stating that the report is the final report, that it does not contain a finding of inappropriate practice and that no further action will be taken as a result.[s 106KE]
- 1.2.74 If the draft report contains a finding of inappropriate practice, the Committee will prepare a final report after providing 1 month for the PUR to make submissions and taking into account any submissions made by the PUR. The final report must not contain a finding of inappropriate practice unless the finding and the reasons for that finding were included in the draft report. The report must be given to the PUR and the Director and will later be provided to the DA.
[s 106L (1A), (1) and (1B)]
- 1.2.75 If the PUR is a practitioner the final report may, with their consent, include recommendations for the practitioner to be disqualified from Medicare and about the nature and period of the

disqualification. Note, these recommendations will not bind the DA. They may still make any of the directions available to them under s 106U.[s 106L]

- 1.2.76 The PUR has **1 month** to seek judicial review in the Federal Court. The final report will be sent to the DA **1 month** after it was provided to the PUR.
- 1.2.77 Under section 106G the Committee must ensure the whole process, from the date of receipt of the referral to giving the final report to the DA, is completed **within 6 months**.
- 1.2.78 The Committee may seek approval from the Director to **extend this period by 3 months at a time**. In addition, the 6 month period is, by force of a determination made by the Committee for this purpose, extended for any period during which the PUR is unable, because of illness, to attend a Committee hearing or for any period during which the PUR or another person fails to comply with a notice to produce documents.

Determination by the Determining Authority

- 1.2.79 If the final report finds that the PUR has engaged in inappropriate practice, the DA must, within **1 month** of receiving the Committee's report, invite the PUR to make submissions about the directions the DA should make. Within 1 month after the submission period has expired the DA will then make a draft determination outlining the sanctions which should be imposed and will forward that draft to the PUR and the Director. The PUR has **14 days** after the day they receive the draft in which to make a submission on the draft determination.[s 106SA, s 106T]
- 1.2.80 Within 1 month after the end of the draft determination submission period and after taking into account any submissions from the PUR, the DA will make a final determination.[s 106TA, s 106U]

Authorisation for a PSR Committee/DA to take no further action

- 1.2.81 The Act currently does not cover the situation where a Committee or the DA is unable to continue with its investigations due to the PUR dying, becoming mentally ill or leaving Australia. Historically when this has occurred the cases sit in abeyance.

2 Chapter 2: The Deeming Provisions (80 / 20 Referrals)

2.1 The Deeming provisions

- 2.1.1 The deeming provisions (s 106KA) were introduced in 1999. Section 106KA provides that, where services are rendered or initiated in circumstances that constitute a prescribed pattern of services, the practitioner is taken to have engaged in inappropriate practice, unless the practitioner satisfies the Committee that exceptional circumstances existed that affected the rendering or initiation of the services on a particular day or particular days.

2.2 Prescribed pattern of services

- 2.2.1 The regulations state that the provision of **80 or more professional attendances on 20 or more days in a 12 month period** constitutes a prescribed pattern of services. This is commonly referred to as the '80 / 20 rule'.
- 2.2.2 'Professional attendance' is defined by the regulations as a service of a kind listed in groups A1, A2, A5, A6, A7, A9, A11, A13, A14, A15, A16, A17, A18, A19, A20, A21, A22 and A23 of Part 3 of the General Medical Services Table.
- 2.2.3 A PUR referred for breaching the 80/20 rule is deemed to have practiced inappropriately. However, the PUR will be given the opportunity to explain that **exceptional circumstances** existed on some or all of the days in question, thus displacing the conclusion that they engaged in inappropriate practice on those days.

2.2.4 There have been many Federal Court cases on Committees' findings under this provision. This is the reason for a separate chapter on this issue. PSR has not received many referrals raising the deeming provisions in recent times presumably because there is an awareness of the provisions and the fact that there will be a referral if a practitioner exceeds the regulations' requirements.

2.3 Exceptional circumstances

2.3.1 Regulation 11 deems that exceptional circumstances exist where there is:

- (a) an unusual occurrence causing an unusual level of need for professional attendances; or
- (b) an absence of other medical services for the patients of the PUR having regard to the location of the PUR's practice and the characteristics of the PUR's patients.[reg 11]

2.3.2 It is open to the PUR to rely on circumstances other than those specified in Regulation 11, as being exceptional, and Committees can find this to be the case. [s 106KA(5)]

2.3.3 If the Committee is satisfied that the PUR has demonstrated exceptional circumstances for a particular day(s), the PUR is still taken to have engaged in inappropriate practice for the remaining days, even if there are fewer than 20 days remaining. [s 106KA(2A)]

2.4 The Committee's task for 80 / 20 referrals

2.4.1 The way in which the deeming provisions operate means that the Committee's task is to systematically:

- (a) decide whether it accepts Medicare Australia's evidence (contained in the referral) that the PUR rendered or initiated 80 or more professional attendances on 20 or more days during a 12 month period;
- (b) decide whether there were **exceptional circumstances** (in the ordinary sense of the term) for any or all of those days (and then consider the effects of those circumstances on the rendering or initiation of services on the days in question);
- (c) decide whether there was an **unusual occurrence** causing an unusual level of need for professional attendances (and then consider the effects of those circumstances on the rendering or initiation of services on the days in question); and
- (d) decide whether there was an **absence of medical services** for the PUR's patients, having regard to the location of the practice and characteristics of the patients (and then consider the effects of those circumstances on the rendering or initiation of services on the days in question).
- (e) In attempting to decide the basis on which the PUR claims that exceptional circumstances have arisen, the best approach is for the Committee to ask the PUR whether they rely on regulation 11 (a) or (b) or simply the ordinary meaning of the term, 'exceptional circumstances'. The Federal Court has ruled that if the PUR does not clarify the basis on which exceptional circumstances is claimed, the Committee must assess this on the basis of the case presented.

2.4.2 For a PUR to establish that exceptional circumstances existed, the circumstances relied upon do not have to be the dominant explanation for the high level of servicing, but do have to have been operative.

2.4.3 Committees should also be mindful that any 'absence of medical services' need not be *due to* the location of the PUR's practice (despite this formula having been put forward in leading Federal Court judgments). Rather the Committee should consider whether there was an absence of medical services *in* the location of the PUR's practice.

2.4.4 Committees are **not required to examine individual attendances**. The deeming provisions obviate the need to examine individual services.

- 2.4.5 Evidence of the 80 or more professional attendances will be set out by way of Medicare data contained in the referral. Medicare Australia has advised the Director that each professional attendance will be physically verified and this will be confirmed in the Medicare Request.
- 2.4.6 The PUR may challenge the Medicare data. The Committee will need to consider and rule on the merits of any such challenge or submissions as to the validity of this evidence.
- 2.4.7 It may be necessary for the Committee to verify or test the PUR's evidence of exceptional circumstances.
- 2.4.8 When weighing up the evidence and making a decision, Committees need to be careful in relation to which of the three heads of 'exceptional circumstances' they are considering. A decision may be found legally invalid if it is founded on irrelevant considerations. For example, considering what a PUR could have done to lower attendance numbers is not relevant to the issue of whether there was an absence of medical services on the days in question for the purposes of Regulation 11(b). Courts have also been critical of Committees which have stated they are not satisfied that exceptional circumstances arose because the circumstances were not of an intermittent nature.

3 Chapter 3: Decision Making

3.1 Introduction

- 3.1.1 This chapter contains information and general principles regarding the Committee's decision making process. [s 106]

3.2 Legal Context of Proceedings of Committees

- 3.2.1 The procedure for conducting a hearing of a Committee is within the discretion of the presiding member. The Committee is not bound by the rules of evidence and may inform itself on any matter in any way it thinks appropriate.
- 3.2.2 The Parliament, through section 106, has given a Committee wide powers to decide what method of conducting a hearing is appropriate. However, nothing in the Act indicates that the Parliament intended to place the processes of a Committee outside the ordinary legal framework for making administrative decisions.

3.3 Scope for Review

- 3.3.1 A citizen who is affected by the actions of a person or body exercising power under a law made by the Parliament may challenge that action under the branch of the law known as administrative law. Broadly speaking, the scope for challenge applies to PSR Committees in the same way as it applies to the actions of any other administrator acting under Commonwealth legislation.[s 5 ADJR]
- 3.3.2 The two potential avenues of challenge which Committees need to be aware of are:
 - (a) the Federal Court, in the exercise of its jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) or the *Judiciary Act 1903*; and
 - (b) the Commonwealth Ombudsman.

3.4 Judicial Review

- 3.4.1 Under the ADJR Act, the Federal Court has jurisdiction to review the legality of a Committee's action. The Court does not and cannot assess a decision on the merits. The grounds of review which the Federal Court may entertain are set out in the ADJR Act and include:
 - (a) that the decision concerned was not authorised by the particular Act;
 - (b) that the decision involved an error of law (i.e. the decision maker misinterpreted the statute under which the decision was made);

- (c) that a breach of the rules of procedural fairness (often referred to as ‘natural justice’) occurred in connection with the making of the decision;
- (d) that procedures required by law to be observed in connection with making the decision were not observed;
- (e) that irrelevant considerations were taken into account in making the decision or that there was a failure to take relevant considerations into account; and
- (f) that the exercise of power by the decision maker was so unreasonable that no reasonable person could have so exercised it.

3.4.2 Under the ADJR Act, the Federal Court has jurisdiction to review a ‘decision’ and ‘conduct’ leading to the making of a decision.

3.4.3 The ADJR Act provides that a ‘decision’ is made when the Committee makes its report. Case law suggests that the Committee’s proceedings leading up to the making of its report are reviewable under the ADJR Act as ‘conduct’.

3.4.4 The remedies the court may grant in judicial review include:

- (a) granting an injunction to stay proceedings;
- (b) setting a particular decision aside;
- (c) remitting the case to the Committee or to a new Committee for fresh consideration; and
- (d) declaring the rights of parties.

3.4.5 The court will, of course, uphold the Committee’s decision if it considers that decision was legally sound.

3.5 Grounds of Judicial Review

3.5.1 The grounds of judicial review that are more likely to arise in connection with Committee proceedings are as follows:

Decision not authorised by Act

3.5.2 This ground of review basically involves the proper interpretation of the statute. If, for example, a Committee in its report made findings that did not relate to services referred to the Committee, the Committee would be acting beyond the powers conferred on it under the Act.[s 106H]

Relevant and irrelevant considerations

3.5.3 A consideration is only relevant if it is one a Committee is bound to take into account. The factors a Committee is bound to take into account depend on the construction of the Act and the referral.

3.5.4 If a Committee, in making its report, took into account conduct of the PUR which did not relate to the services which were the subject of the referral the Committee would be taking irrelevant matters into account.

3.5.5 Taking into account irrelevant considerations must be avoided. It can be a difficult task to assess whether a consideration is relevant but regard must be had to the specific question before the Committee. For example, in an 80/20 case, ‘were there exceptional circumstances?’ should not involve consideration of the question ‘did the PUR do anything to mitigate the existence of exceptional circumstances?’. Similarly, in such a case, the Committee should not ask itself whether ‘the circumstances were of an intermittent nature’. Such reasoning has been heavily criticised in Federal Court decisions. Generally, the Committee should refrain from commenting on any irrelevant matter unless it is an issue to be dealt with in terms of section 106J, 106KC, 106N, 106XA or 106XB.

3.5.6 The Committee should, however, comment on the submissions raised by the PUR (regardless of whether the submissions have any merit) to minimise the risk of a claim that the Committee failed to take account of relevant considerations (or failed to afford procedural fairness by not taking adequate notice of the PUR’s case).

3.5.7 Any other observations that a Committee may make must arise fairly from the referral to the Committee as to the appropriateness of services and must be relevant to the general scope and purpose of the legislation establishing the PSR Scheme.

Abuse of power

3.5.8 Committee proceedings may be set aside as an abuse of power if they become oppressive of the PUR. Oppression may arise through protracted delays in the Committee process. In practice, this ground of review should not arise because the Act seeks to ensure expedition in the process through imposing deadlines. Allegations of oppression occasionally arise in the context of robust exchanges between the Committee and a PUR during a hearing. As long as a Committee remains focused on the relevant issue and provides a PUR with a proper opportunity to respond to questions, allegations and complaints of oppression in the hearings are not likely to succeed.

Procedural fairness

3.5.9 The rules of procedural fairness are that:

- (a) there must be no actual or apparent bias in the decision-making process, i.e. the process must operate with complete impartiality and must be seen as not involving any element of prejudice; and
- (b) when a decision is to be made which may deprive a person of some right or interest or lead to loss of reputation or livelihood, the person is entitled to know the case against him or her and must be given an opportunity of replying to it.

Procedural fairness — bias

3.5.10 The PUR may challenge the appointment of a Committee member on the grounds that the member:

- (a) is biased or is likely to be biased; or
- (b) is likely to be thought, on reasonable grounds, to be biased.[s 96]

3.5.11 Even if no challenge is made while a Committee is being appointed, the rule against bias continues to apply. Committee proceedings may be halted or set aside by court action if it emerges that the bias rule is infringed. The test the court will adopt is whether or not a hypothetical ‘reasonable observer’ might form the view that the Committee may not bring an impartial mind to resolving the matters before it.

3.5.12 A member of a Committee should automatically disqualify himself or herself if he or she has a direct pecuniary interest in the outcome of the Committee’s decision (e.g. as a shareholder in a corporate body related to the PUR). Very careful consideration should also be given to the appearance of any other close relationship with the PUR (e.g. partnership, family, business, competitor, social or professional).

3.5.13 If an allegation of bias is made against a member, the Committee must inform the Director immediately.

3.5.14 Cases will arise where a specialist is under review and the limited number of specialists in that field raises the possibility that the specialist on the Committee knows the PUR. This in itself is not a basis for disqualification. However, a reasonable apprehension of prejudice will be basis for disqualification.

3.5.15 A Committee member’s history of expressing a particular opinion is not a basis for disqualification but expression of opinions regarding the conduct of the PUR or regarding a group of which the person is a member, is a basis for disqualification.

3.5.16 Committee members must come to their task with an open mind and must be seen to come to their task with an open mind.

- 3.5.17 The case the PUR has to answer must be made clear to them. This is achieved by:
- (a) the Director's report accompanying the referral setting out the reasons he or she believes the PUR's provision of services may have constituted 'engaging in inappropriate practice';
 - (b) the notice of hearing under section 102 giving the PUR particulars of the matter to which the hearing relates;
 - (c) in the course of the hearing, the Committee giving the PUR notice of all matters on which it may make findings adverse to him or her and giving the PUR the opportunity to respond to those matters; and
 - (d) after hearing the PUR, the Committee preparing a draft report and giving it to the PUR, inviting them to make submissions on it, before the Committee makes a final report. The final report cannot include a finding of inappropriate practice unless that finding and the reasons for the finding were set out in the draft report. If a PUR's submissions result in the Committee wishing to add additional reasons for finding the service(s) was inappropriate, the Committee should ensure these reasons are linked to its consideration and rejection of the PUR's submission.[s 106L(1B)]
- 3.5.18 The intention of the Act is that the Committee sit as 'a committee of the peers of the PUR' and exercise its own judgment in relation to the evidence before it, using its own collective knowledge in the evaluation. Because a Committee is a tribunal of experts, it does not breach the rules of procedural fairness in relying on its own general experience and expertise in coming to its conclusions.

3.6 Effect of Judicial Review Application on Committee Proceedings

- 3.6.1 It is not appropriate for a Committee to suspend its proceedings merely because the PUR brings an application in the Federal Court. The Committee should continue its work until such time, if ever, as the Court otherwise orders or the legal advisers to the Committee recommend suspension of the proceedings.

3.7 Ombudsman

- 3.7.1 The Ombudsman investigates complaints about defective administration. The Ombudsman will not undertake a merits review but will focus on the administrative processes.
- 3.7.2 The Ombudsman conducts investigations in private and operates in a relatively informal way. Complainants may make use of the Ombudsman's services free of charge.
- 3.7.3 The Ombudsman may conclude that an action was contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, was based either wholly or partly on mistake of law or fact, was in all the circumstances wrong, was an improper use of discretionary power or was based on irrelevant considerations..
- 3.7.4 If the Ombudsman concludes that action the Director or a Committee took was contrary to law or was unreasonable or oppressive, he or she could recommend that some action be taken to rectify the problem.

4 Chapter 4: Committee Procedures - a practical summary

4.1 On Receipt of the Referral

Read the referral

- 4.1.1 Each Committee member must carefully read and consider the referral.

Consider the possibility of bias

- 4.1.2 Committee members must consider whether there is any possibility that they or another member should decline to participate in the Committee for reasons of a perception of bias.
- 4.1.3 In particular, Committee members should consider:
- (a) the nature and extent of any personal or business contact with the PUR;
 - (b) the nature and extent of any professional contact with the PUR; and
 - (c) whether an objective bystander would reasonably think the Committee member might not bring an impartial and unprejudiced mind to the hearing.
- 4.1.4 Committee members should bring any potential issues of bias to the Director's attention immediately.
- 4.1.5 Because the PSR process involves peer review, it is likely that, from time to time, a Committee member will know the PUR. Mere knowledge of the PUR, or relatively minor professional contact with the PUR, are not grounds for disqualifying the member. However, the degree of contact needs to be considered and an 'objective bystander test' applied.
- 4.1.6 If there is any doubt, the safe course is for the member to discuss the matter with the Chairperson and/or Director and to stand down. It is then a matter for the Director to find a replacement.
- 4.1.7 If the degree of professional contact is minor and the member considers that, to an objective bystander, no issue of bias would arise, the member should, at the start of the hearing, declare the extent of his or her knowledge of, or contact with, the PUR and state that he or she is satisfied that it is not such as to cause an objective bystander to think the member might not bring an impartial and unprejudiced mind to the hearing. If the member does this, they and other Committee members should also be prepared to consider any submissions by the PUR about the issue. Any submissions should be considered fully and carefully.

Claim of bias by the PUR

- 4.1.8 The PUR is entitled to challenge the appointment of a Committee member on the grounds that the member:
- (a) is biased or is likely to be biased; or
 - (b) is likely to be thought, on reasonable grounds, to be biased. [s 96]
- 4.1.9 The challenge must be made in writing and given to the Director **within 7 days** after the PUR receives notice of the referral. Where a challenge is made, the Director is required to consider the issue and may appoint another panel member to the Committee.

4.2 First Meeting of Committee Members

- 4.2.1 The Chairperson will arrange a convenient time with the Case Manager to hold the first Committee meeting.
- 4.2.2 The Case Manager will notify all Committee members of the time and place for the meeting.
- 4.2.3 The meeting must be convened **within 14 days** of the Committee members' appointment unless the PUR challenges an appointment.
- 4.2.4 If the PUR challenges an appointment, the **14 days** starts from the appointment of a new Committee member or the Director's decision not to appoint a new member.
- 4.2.5 No Committee action is invalidated by virtue of the fact that the meeting was not convened **within 14 days**. However, Committees should always make every effort to meet within the 14 day period.[s 97]
- 4.2.6 The first meeting is held in without the PUR in attendance. The meeting may be conducted in person or by telephone or video conferencing.
- 4.2.7 A majority of Committee members must be present at all times during the meeting.

- 4.2.8 The Chairperson will preside at the meeting, but if he or she is absent, the remaining Committee members can elect a member to preside. [s 99]
- 4.2.9 At the first meeting, the Committee members should consider:
- (a) whether the PUR may have engaged in inappropriate practice in connection with rendering or initiating the services the subject of the referral;
 - (b) if it is necessary to hold a hearing;
 - (c) the manner in which the PUR's provision of the services will be examined (e.g. whether the Committee will use the sampling procedures to examine the PUR's conduct);
 - (d) the form and content of the notice of hearing; and
 - (e) any other relevant matter arising out of the referral.
- 4.2.10 There must be a hearing if the Committee decides the PUR may have engaged in inappropriate practice.
- 4.2.11 If the Committee decides it is not necessary to hold a hearing because the circumstances do not constitute inappropriate practice, the Committee will inform the PUR and the Director accordingly. [s 101(2)]
- 4.2.12 If the Committee decides to hold a hearing, the Committee will set a date and direct the Case Manager to prepare a draft notice of hearing for the Committee's approval.

4.3 Notice of Hearing

- 4.3.1 The notice of hearing must be given to the PUR **at least 14 days** before the day of the hearing. However, the Committee should try to allow as much time as possible between giving the notice and the hearing.
- 4.3.2 The particulars in the notice must include particulars of the referred services to which the hearing relates. [s 102(3)]
- 4.3.3 The notice should require the PUR to appear at the hearing and give evidence to the Committee.
- 4.3.4 To ensure the PUR receives the notice, the Case Manager sends it by courier to obtain a receipt and confirmation of delivery. [s 102]

4.4 Correspondence with the PUR about the Hearing

- 4.4.1 The PUR should be sent a covering letter with the notice of hearing, explaining the format of the hearing and directing the PUR's attention to relevant parts of the legislation which deal with the failure to appear or the failure to give evidence, or answer questions asked by the Committee.
- [ss 104, 105]

4.5 Producing Documents and Summoning Witnesses

Notice to produce documents

- 4.5.1 The Committee may require the PUR, or any other person the Committee believes to have possession, custody or control of, or be able to obtain, documents that are relevant to the matters referred to the Committee, to produce the documents to a Committee member or a person nominated by the Committee member.
- 4.5.2 Such documents can include clinical or practice records of services rendered or initiated during the review period by:
- (a) the PUR;
 - (b) a practitioner employed by the PUR; or
 - (c) a practitioner employed by a body corporate of which the PUR is an officer.
- 4.5.3 A Committee may require production of documents specified either by description (e.g. 'all patient records listed in the Medicare Australia letter of X) or by content (e.g. 'any documents

setting out the PUR's protocol for therapy XYZ'). The Committee cannot require the creation of documents containing such information, but may ask for relevant information when questioning a witness or PUR during a hearing.

- 4.5.4 If the PUR is required to produce documents under a section 105A notice to produce and fails to comply with that notice, then, subject to the procedure in sections 106ZPM (2) and (3), a Medicare benefit is not payable for any services that person renders or initiates prior to the document being produced or the information given. [s 106ZPM]
- 4.5.5 The Committee Chairperson should notify the Director that the Committee has formed the view that the PUR has intentionally refused or failed to comply with the notice.
- 4.5.6 If the Director considers that section 106ZPM (1) prevents Medicare benefits from being payable, the Director must give a notice to the person, with a copy to Medicare Australia, to that effect.
- 4.5.7 If this has been done, the person is taken to be fully disqualified under section 19D of the Act. [s 106ZPM]
- 4.5.8 If a person, other than the PUR, intentionally refuses or fails to produce a document or give information, that person is guilty of an offence and the Director should be advised so relevant action may be taken. [s 106ZPN]
- 4.5.9 **NOTE:** The word 'information' in the title of section 105A refers to the information to be given to the Committee under section 105A(2)(d)(i) and (ii) as to who has possession, custody or control of documents, not to a power for the Committee to require the giving of information at large. However, the PUR will have been given a notice under section 102 of the Act and that notice may require them to give evidence to the Committee. The evidence given to the Committee would relate to the referred services and in this way information about those services should be able to be obtained.

Summoning of witnesses by Committee

- 4.5.10 The Committee can summon a person (other than the PUR) to:
- (a) appear at a hearing to give evidence; and
 - (b) appear at a hearing to produce any documents which are referred to in the summons.
- 4.5.11 Witnesses the Committee summon to appear at a hearing are entitled to be paid the allowances fixed by the regulations.
- 4.5.12 The Case Manager will calculate the allowances payable.
- 4.5.13 A person served with a summons to appear at a hearing must not, without reasonable excuse, fail to appear at the hearing.
- 4.5.14 As persons summoned are required to attend each day of the hearing, the Chairperson should formally excuse them from further attendance once the Committee and the PUR have finished questioning them.
- 4.5.15 If a person summoned to attend fails to do so, that person is guilty of an offence. The Director should be advised so appropriate action may be taken. [ss 106D 106E]

4.6 Assessment of Services

- 4.6.1 There are four ways the conduct of the PUR, in relation to referred services, may be assessed:
- (a) valid statistical extrapolation from examination of a **sample of services** taken from a class of services (s106K);
 - (b) prima facie inference where a **prescribed pattern of services** has been rendered (s106KA);
 - (c) reliance on **extraneous information** where relevant service records are inaccessible (s106KB); or

- (d) case-by-case examination of services.

Sampling

- 4.6.2 The Committee may proceed by examining a sample of services from a class of services covered by the referral. [s 106K]
- 4.6.3 If the Committee finds that the PUR's conduct, in connection with a proportion, or all, of the sample of services, constituted inappropriate practice, the PUR will be deemed to have engaged in inappropriate practice in relation to the same proportion of services in the particular class.
- 4.6.4 Sampling must be done in accordance with the Minister's determination on sampling methodologies, unless a statistician, accredited by the Statistical Society of Australia Inc., advises the Committee that the proposed sampling method is valid.
- 4.6.5 The Case Manager will help the Committee utilise valid sampling methodologies.
- 4.6.6 In the Federal Court decision of *Phan v Kelly*, the Court decided that a Committee can use any approved sampling methodology at any stage of the decision making process up to the time of the decision. That is, there is no restraint on the Committee changing the method provided the methodology satisfies section 106K(4). There is also no requirement for the PUR to be given notice of this.
- 4.6.7 The Committee should carefully detail the methodology employed in examining a sample of services.

Prescribed pattern of servicing

- 4.6.8 Part 3 of the Health Insurance (Professional Services Review) Regulations 1999 sets out the circumstances in which rendering or initiating services that are professional attendances constitutes a prescribed pattern of services. [s 106KA]
- 4.6.9 Unless a PUR who has rendered or initiated a prescribed pattern of services satisfies the Committee that those services were provided in exceptional circumstances, the PUR is deemed to have engaged in inappropriate practice in connection with those services.
- 4.6.10 Further details about referrals that fall within the prescribed pattern of services and the operation of the deeming provisions are set out in Chapter 2.

Extraneous information

- 4.6.11 If the PUR's clinical or practice records are missing, inadequate, illegible or otherwise incomprehensible, so the Committee cannot make a finding using sampling, the Committee can make use of any other information that it can obtain, including information supplied by Medicare Australia for the purpose of making a finding. [s 106KB]
- 4.6.12 If the Committee then considers that the PUR has engaged in inappropriate practice, but cannot identify or determine the number of particular services in which the PUR engaged in inappropriate practice, the Committee may still make a finding that the PUR engaged in inappropriate practice in connection with some or all of the referred services.
- 4.6.13 A finding of inappropriate practice under section 106KB will not permit a determination for repayment of Medicare benefits, as this is excluded by section 106U(1)(ca)(ii).

Case-by-case examination of services

- 4.6.14 Examination of all services in a large class is likely to be onerous and time-consuming, and courts have recognised that sampling may be the only practical approach in such situations.

4.6.15 However, there may be circumstances where it is necessary or convenient to examine all services, for example, where a small number of services have been rendered or where only a few records are available.

4.7 At the Hearing

General

- 4.7.1 A hearing is not a trial of the PUR. Rather, its purpose is to provide the Committee with an opportunity to hear the PUR's evidence, clarify any queries it has and record the PUR's evidence on the transcript of proceedings. Committee hearings will often take place in Court and Tribunal rooms which are set up for adversarial processes for practical reasons and to emphasise the solemnity of the process. However, Committee Members should bear in mind that the hearing is simply a meeting at which the PUR is a potentially helpful source of evidence. Questions directed at the PUR should not be designed to elicit a confession, but rather should be directed to obtain the most relevant evidence on record for use in making a decision and preparing a report.
- 4.7.2 The Committee is to make findings only in respect of the **referred services**, but it is **not required to have regard to** conduct in connection with rendering or initiating **all of the referred services**.
- 4.7.3 Also, the Committee's investigation is not limited by the reasons given in the Director's report for the Committee or in the Medicare request to the Director. There are, however, important safeguards, in the interests of natural justice, on what findings a Committee can make. These essentially require notice to be given to the PUR of potentially adverse findings, with reasons, and the opportunity to respond.[s 106H]
- 4.7.4 If the Committee considers that the PUR may have engaged in inappropriate practice in relation to other services, the Committee can request the Director to review the provision of those services. Those concerns can then become the subject of a fresh investigation and, if appropriate, form a separate referral to the same or another Committee. [s 106J]
- 4.7.5 The Committee must also refer matters to the Director if there is significant threat to the life or health of any person caused by the PUR or if there are professional concerns.[ss. 106XA, 106XB]
- 4.7.6 All meetings of a Committee (including a hearing) may be conducted in whatever way the Committee thinks fit and the procedure for conducting the hearing is within the discretion of the member presiding.
- 4.7.7 The procedures must be fair and Committees should ensure that the PUR receives natural justice. In this regard, the provisions of sections 106H(4) and (5) are very important. Section 106H(4) provides that, before a Committee makes a finding of inappropriate practice, it has to notify the PUR, provide reasons setting out the basis for the finding and give the PUR an opportunity to respond. [s 106H(4)]
- 4.7.8 In addition, when it comes to the final report, this must not contain a finding of inappropriate practice unless the finding and the reasons for it were included in the draft report. If a PUR's submissions results in the Committee wishing to add additional reasons for finding the service(s) was inappropriate, the Committee should ensure these reasons are linked to its consideration and rejection of the PUR's submission. [s 106L(1B)]
- 4.7.9 These requirements, together with the steps the Committee will itself take, help to serve the interests of fairness and natural justice and to ensure that the proceedings are legally valid.
- 4.7.10 Meetings must be held in private. [s 98(2)]
- 4.7.11 The Committee may inform itself in whatever way it thinks fit. It is not bound by the rules of evidence although those rules do provide sound guidance. This means it can accept evidence which may not be accepted in a court. A Committee should, however, be careful about the weight it gives such evidence. For example, it should give more weight to 'first hand' evidence over

‘second hand’ (or hearsay) evidence. This is especially so if the evidence is crucial to an issue before the Committee. [s 98(3)]

Opening statement

4.7.12 The Chairperson should make an opening statement which:

- (a) lists those present at the beginning of each day of hearing;
- (b) introduces the Committee members;
- (c) clarifies the role of any person accompanying the PUR;
- (d) clearly states the issues which are before the Committee;
- (e) informs the PUR that the Committee is not limited by these issues (s.106H(3));
- (f) informs the PUR of the Committee’s considerations that adequate and contemporaneous medical records are kept;
- (g) outlines the format of the hearing;
- (h) asks the Case Manager to tender key documents into evidence;
- (i) informs the PUR of their rights such as being able to request an adjournment if this is needed;
- (j) informs the PUR of the steps that will be taken to complete the draft and final report, including the steps that will be taken if there is, or is not, a finding of inappropriate practice;
- (k) states that any finding of inappropriate practice must be included in the Committee’s draft report and that the PUR will have the opportunity to comment on such a report, if there is one; and
- (l) asks whether the PUR has any initial questions.

4.7.13 A suggested outline for an opening statement is included at Appendix 2.

Adviser to the PUR

4.7.14 The PUR is entitled to be accompanied at the hearing by a lawyer (i.e. a barrister or a solicitor) or another adviser. [s 103(1)(b)]

4.7.15 If the PUR is accompanied by a lawyer, the lawyer is entitled (subject to any reasonable limitations or restrictions imposed by the Committee) to:

- (a) give advice to the PUR;
- (b) address the Committee on questions of law; and
- (c) make a final address to the Committee on questions of law, the conduct of the hearing and the merits of the matters before the Committee. [s 103(2)]

4.7.16 If the PUR is accompanied by an adviser who is not a lawyer, the Committee may allow that person (subject to any reasonable limitations or restrictions imposed by the Committee) to:

- (a) give advice to the PUR; and
- (b) make a final address to the Committee on the merits of the matters to which the hearing relates. [s 103(3)]

4.7.17 Usually, a PSR lawyer will also attend the hearing to give advice to the Committee as required.

4.7.18 If the PUR, or his or her lawyer, makes a submission on a point of law, the Chairperson should call an adjournment to seek legal advice from the PSR lawyer in relation to the submission. Depending on the submission, the Chairperson may defer a response pending legal advice or reject or accept the submission.

4.7.19 If the submission is rejected, the Chairperson should briefly state why.

4.7.20 It will often be appropriate to take the point of law on notice for a later ruling after further consideration.

4.7.21 The PUR is responsible for payment of all fees and expenses associated with the appearance of a lawyer or another adviser accompanying the PUR. The PUR is also responsible for their own costs of obtaining a copy of the official transcript.

Obstructing the Committee

4.7.22 It is an offence to obstruct or hinder the Committee or a Committee member in the performance of the functions of the Committee or to disrupt a hearing before the Committee. [s 106EA]

4.7.23 Anyone at the hearing acting in such a manner should be made aware of this offence and advised to modify their behaviour accordingly.

Exhibits

4.7.24 All material placed before the Committee should be given an exhibit number. This will help identify the material.

4.7.25 All exhibits should be handed to the Case Manager for safe keeping during the Committee's consideration.

4.7.26 The PUR is entitled to produce written statements as to his or her character. Any such statements should also be given an exhibit number.

4.7.27 The PUR should be permitted to inspect the exhibits at all reasonable times.

Oath or affirmation

4.7.28 The Chairperson or another Committee member should administer the oath or affirmation to each person (including the PUR) giving evidence at the hearing. [s 106A]

Questioning the PUR

4.7.29 The objective when a Committee is questioning the PUR (or any other witness) is to elicit oral evidence relevant to the issues being considered.

4.7.30 Relevant evidence may include evidence of facts directly relating to the referred services (such as a PUR's own actions or observations), an expert witness's opinion on a real or hypothetical situation, or evidence which throws light on the credibility of any witness (thus helping the Committee assess any conflicting evidence).

4.7.31 The following are questioning techniques that can help you to elicit oral evidence:

- (a) be well prepared and understand the areas of questioning for which you will be responsible. For example, share the lead questioning for each service among the Committee members;
- (b) use formal names and titles to avoid familiarity and to get a clear record in the transcript;
- (c) maintain a calm, detached and objective approach;
- (d) ask easy questions first (e.g. name, address, occupation, etc.) to help a witness relax and concentrate;
- (e) ask precise questions – each question should address only a single item in simple words;
- (f) bring witnesses politely, but firmly, back to the question if necessary;
- (g) do not otherwise interrupt – an interruption may enable a witness to avoid an answer or suggest you have a closed mind;
- (h) repeat the question if it is not answered or the answer is unclear;
- (i) ask supplementary questions to resolve any uncertainty;
- (j) if you are dissatisfied with an answer, make your dissatisfaction with the answer, and the reasons for it, known to the witness before they have finished giving evidence;
- (k) have several copies of any document, diagram or photograph you intend asking about.

Do not:

- (l) ask long questions – it is better to break them up than have the witness unable to remember the detail;
- (m) ask complex (e.g. double negative) or multi-part questions – the witness may be confused and/or fail to answer all parts;
- (n) interrupt unless the witness has clearly strayed into irrelevant material;
- (o) use leading questions (i.e. ones which suggest an answer) unless the subject is not in issue (e.g. name, address);
- (p) be drawn into debate or argument with witnesses – you need their evidence, not your own;
- (q) try to educate the PUR - this is not your role;
- (r) be aggressive – this may seem like prejudice.

4.7.32 The PUR should, if necessary, be allowed to consult his or her adviser before answering a question.

4.7.33 Give the PUR the chance to make comments before the conclusion of each day of hearing and at the end of the hearing. It is also very important to ensure that the PUR has had a chance to respond to all of the concerns identified in the referral to the Committee. Any new or additional concerns that the Committee may have identified should also be put to the PUR and the PUR must be given an opportunity to respond and to tender any documents which they consider are relevant.

Anger and Sarcasm

4.7.34 It is important that Committee members remain calm and objective at all stages of the PSR process.

4.7.35 All interactions are recorded by the transcriber. A PUR may use any comment to demonstrate that the member concerned was biased against the PUR, whether through positive hostility or mere unwillingness to hear the PUR. Any inappropriate outbursts may also lead to the process itself being found to be unfair.

4.7.36 Sarcasm is also inappropriate and must not occur. Again such displays risk the hearing being challenged.

Objections

4.7.37 If objections arise they will usually be on the grounds of relevance.

4.7.38 The Chairperson should:

- (a) note and rule promptly, if possible; and
- (b) adjourn to discuss or take advice, if necessary.

4.7.39 The Chairperson can always undertake to rule later but, in the meantime, proceed with the hearing.

Witnesses

4.7.40 Subject to any limitations the Committee imposes, the PUR is entitled to call witnesses (other than character witnesses) to give evidence at the hearing. [s 103(1)(c)]

4.7.41 The PUR is responsible for payment of all expenses his or her witnesses incur to give evidence at the hearing. [s 103(5)]

4.7.42 If the PUR wants to introduce an expert, the Committee should request the PUR to obtain a written report from that expert so the Committee has some insight into the witness' evidence. The PUR does not have to do this.

4.7.43 If the PUR does not object to their witness providing a written report, the Committee should inform the PUR that, following receipt of the report, it will decide whether or not it is necessary for the expert to be called to give oral evidence.

- 4.7.44 All witnesses should be sworn or give an affirmation before giving evidence. [s 106A]
- 4.7.45 A witness must not refuse or fail to:
- (a) be sworn or make an affirmation;
 - (b) answer a question; or
 - (c) produce a document that he or she is required to produce under the Act. [s 106E]
- 4.7.46 A witness (other than the PUR) is not excused from answering a question on the grounds that they might incriminate themselves. [s 106E(3)]
- 4.7.47 The PUR is entitled, subject to any reasonable limitations or restrictions imposed by the Committee, to question a person giving evidence at the hearing. [s 103(i)(e)]

PUR's failure to appear or answer questions

- 4.7.48 Sections 104 and 105 set out what is to be done if the PUR:
- (a) fails to appear at the hearing; or
 - (b) appears at the hearing, but:
 - (i) refuses or fails to give evidence; or
 - (ii) refuses or fails to answer a question asked by a Committee member [ss 102, 104, 105]
- 4.7.49 The interaction of sections 102, 104 and 105 is complex. They should be applied as follows:
- (a) If the PUR fails to appear at the hearing or appears but refuses or fails to give evidence, the Committee may notify the Director of that failure. This provision enables the Committee, in deciding whether to notify the Director, to take account of factors beyond the PUR's control.
 - (b) The Committee has the option to proceed with the hearing even though the PUR has failed to appear or appears but fails to give evidence.
 - (c) Alternatively, the Committee may decide to hold another hearing.
 - (d) The Committee cannot proceed with the hearing or notify the Director of the PUR failing to appear or to give evidence if the PUR produces a medical certificate attesting to the fact that the PUR has a medical condition which prevents them from attending the hearing. If the Committee thinks it appropriate, it may also ask the PUR to undergo a medical examination by an independent practitioner who is unconnected with the PUR. It must then assess, on the basis of the medical evidence before it, whether it will proceed with the hearing. Practically, this is obviously difficult and it will have the likely result of the hearing being adjourned. However, it can be a very useful action to take if the Committee doubts the certification provided and considers the PUR needs to better appreciate that the hearing will ultimately occur. [s 104(5)]
 - (e) If the Director is advised by the Committee of the PUR's failure to appear or give evidence, the Director must take action to disqualify the PUR.
 - (f) If disqualified, the PUR may request the Committee, in writing, to hold another hearing. The PUR has 1 month after the delivery of the draft report to make such a request. If the PUR does request another hearing the Committee must hold one as soon as practicable. [s 105(3)]
 - (g) If the PUR later appears at a hearing, gives evidence and otherwise cooperates with the Committee members during the course of the hearing, the Committee must inform the Director that the PUR has appeared and given evidence as required.
 - (h) The Director must then revoke the PUR's disqualification.
 - (i) An assessment of a failure by the PUR to give evidence must be made subject to the exemption concerning self-incrimination.

4.7.50 At any hearing, the PUR may properly refuse to answer a particular question on the ground that the answer might tend to incriminate him or her. The Committee, however, must believe that the answer might tend to do so.

4.7.51 A deliberately non-responsive or unhelpful answer does not constitute a refusal or failure to give evidence. The Committee should not refer the PUR to the Director in such a case. The Federal Court criticised a Committee for referring its case to the Director in such circumstances in the decision of *Hill v Holmes*. [s 104]

If a criminal or civil offence is suspected

4.7.52 If the Committee thinks material before it indicates that the PUR may have committed a relevant criminal offence or civil contravention, the Committee may send the material to Medicare Australia together with a statement of the matters it thinks may have constituted the offence. [s 106N]

4.7.53 If the Committee chooses to do this, it can either continue with its consideration of the referral (except to the extent that it relates to the possible fraud) or suspend its consideration of the referral for such period as it thinks appropriate.

Considering the evidence

- 4.7.54 Each Committee member must carefully consider and weigh all of the evidence before the Committee. This is an ongoing process and can be facilitated by using the workbooks provided by the Case Manager.
- 4.7.55 The Committee should accept facts and evidence presented if it believes, on the balance of probabilities, that they are true and accurate.
- 4.7.56 If a Committee has doubts about the oral evidence given by the PUR, the Committee should attempt to raise the inconsistencies in the PUR's oral evidence with their answers to the foundation questions or to what is contained in the medical records. Not only is this fairer to the PUR, it will also strengthen the findings in the draft report, particularly a statement like 'the Committee did not accept the PUR's evidence on X...'.
- 4.7.57 The Committee can only make findings about services which were specified in the referral. It is not required to have regard to conduct in connection with all of the services covered by the referral, but may do so if appropriate. [s 106H]

Adjournments

- 4.7.58 The Chairperson may adjourn the hearing from time to time as he or she thinks fit. If the Committee wishes a document to be tendered into evidence it should always adjourn the hearing to discuss this briefly with the Case Manager and the Committee's legal advisor. The Chairperson must consider all requests made by the PUR for an adjournment and should grant such requests if they are reasonable.
- 4.7.59 It is also strongly recommended that the Chair adjourns the hearing if any difference of opinion occurs between Committee members. It is important that any areas of disagreement are discussed in the absence of the PUR.
- 4.7.60 A suggested form of words for adjournments is set out in Appendix 3.

Secrecy

- 4.7.61 Disclosure of information concerning the affairs of any person which is acquired as a result of duties performed under the Act is prohibited. This applies to all Committee members, the Case Manager and each person the Director engages in connection with the PSR Scheme. [s 130]
- 4.7.62 No one is allowed to disclose the deliberations or findings of a Committee or any information or evidence given to the Committee (except to a lawyer). The penalty on conviction is imprisonment for up to 12 months. [s 106ZR]

Final address

- 4.7.63 After the Committee has heard all the evidence, the PUR may, subject to any reasonable limitations or restrictions the Committee imposes, make a final address to the Committee on:
- (a) questions of law;
 - (b) the conduct of the hearing; and
 - (c) the merits of the matters to which the hearing relates. [s 103]
- 4.7.64 A lawyer accompanying the PUR may also make a final address to the Committee on the above matters. An adviser who is not a lawyer is limited to making submissions on the merits of the matters before the Committee.
- 4.7.65 If the PUR is accompanied by both a lawyer and another adviser, only one of them may make a final address to the Committee, not both of them. [s 103(4)]

Closing statement by Chairperson

- 4.7.66 After hearing the final address, the PUR should be advised that he or she will be given the Committee's draft report and invited to comment on it.
- 4.7.67 The Chairperson should then adjourn the hearing indefinitely.
- 4.7.68 A suggested outline of a closing statement by the Chairperson is set out in Appendix 4.

4.8 After the Hearing

Preparing the draft report

- 4.8.1 Although it is not necessary for the Committee members to unanimously agree, it is important that the Committee makes its decision jointly so as to identify areas of agreement and disagreement.
- 4.8.2 The Committee must prepare a draft report which sets out its preliminary findings and reasons for those findings. [s 106KD]
- 4.8.3 All pages and paragraphs of the draft report should be consecutively numbered and headings should be used throughout.
- 4.8.4 The draft report must be given to the PUR, together with a notice inviting them to make written submissions suggesting changes to the draft report **within 1 month** of receiving the report. [s 106KD(3)]
- 4.8.5 The report may contain recommendations about disqualification only if the PUR consents. Those recommendations are not, however, binding on the DA.
- 4.8.6 If the Committee has referred the PUR's conduct to the Director because of its opinion that:
- (a) the PUR's conduct is or was a significant threat to the life or health of another person; or
 - (b) the PUR failed to comply with professional standards;
- that referral must be mentioned in the draft and final report. If the Committee refers such conduct to the Director after it has prepared the draft report, it must be mentioned in the final report. [s 106M]

No finding of inappropriate practice

- 4.8.7 Where the report does not contain a finding by all or a majority of the members that the PUR engaged in inappropriate practice, the Committee should proceed in accordance with section 106KE. This section sets out a simplified procedure for concluding the matter.

Preparing the final report

- 4.8.8 **After 1 month** has elapsed since the Committee invited the PUR to make written submissions on the draft report, the Committee should prepare its final report. If the PUR seeks an extension of time to provide submissions the Chair may grant this request. It is recommended written correspondence confirming the extension also specifies the time by which any submissions must be lodged and advises that the Committee will finalise its report after this date if no submissions are received. [s 106L]
- 4.8.9 The Committee must consider every submission the PUR made in his or her response to the draft report. In its final report, the Committee should refer to receiving the submissions and the fact that they were considered.
- 4.8.10 The final report must not include a finding of inappropriate practice unless the finding and the reasons for that finding were included in the draft report provided to the PUR. [s 106L(1B)]
- 4.8.11 The Committee must give a copy of the final report to the PUR and to the Director.
- 4.8.12 The Committee must wait a minimum of **1 month after the report goes to the PUR** before providing the report to the DA. [s 106L]

4.9 Timeframes

- 4.9.1 The Committee must report to the DA **within 6 months** of receiving the referral. [s 106G]
- 4.9.2 The Chair of a Committee, or if the Chair is not available another Committee member, can ask the Director to grant extensions to this 6-month period. Extensions of up to 3 months can be granted. [s 106G(2)(b)]
- 4.9.3 The Committee should direct the Case Manager to prepare the letter to the Director if an extension is necessary.
- 4.9.4 If:
- (a) the PUR is unable to attend a hearing because of illness;
 - (b) the PUR does not comply with a notice to produce (s105A); or
 - (c) the Committee suspends its consideration of the referral because it suspects a relevant civil offence has occurred;
- the Committee can decide to extend the 6-month timeframe by the length of time the matter is 'suspended'.
- 4.9.5 The Committee should direct the Case Manager to draft the necessary determination.

4.10 Other issues that may arise

4.10.1 Safety and Security Issues

- 4.10.2 It is strongly recommended that Committees only conduct hearings within business hours for personal safety and security reasons. This is also likely to be fair and reasonable for the PUR, although the Committee should take account of the PUR's views in setting a time, where possible.

Dealing with the Media

- 4.10.3 Media enquiries about Professional Services Review and the PSR process, including Committee hearings, must be referred to the Director.
- 4.10.4 As the Committee is bound by rules of secrecy, it is not at liberty to discuss Committee proceedings, or the details of a Medicare Request or a Committee referral.

5 Chapter 5: Legal rights and obligations

5.1 Destruction of Confidential Papers and Data

- 5.1.1 In the course of an enquiry, Committee members will be provided with confidential and sensitive information about the PUR and some of his or her patients. Members must keep the information in a secure location until a determination by the DA becomes effective and there is no likelihood of an appeal which could result in further hearings or changes to the Committee's report.
- 5.1.2 PSR will advise Committee members when determinations are effective and arrange for the confidential collection and destruction of information.
- 5.1.3 Committee members must be particularly careful when disposing of computer hardware to ensure any confidential information relating to the PSR Scheme is first removed.
- 5.1.4 PSR is transitioning to electronic information. Committee members will require a laptop with Adobe PDF Reader (available free) to be brought to all meetings and hearings.

5.2 Confidentiality and Privacy

- 5.2.1 It is vital that Committee members and staff maintain the very high level of confidentiality of Committee proceedings. There are a number of sanctions which can be imposed on people who breach the confidentiality and privacy provisions in a number of Acts. These are summarised in the following table.

Action	Cause	Sanction
Civil action	breach of confidence	damages, injunction
Privacy Act	unauthorised disclosure of personal information	injunction, corrective action, damages
Crimes Act s70	unauthorised disclosure of information by Commonwealth officers (this term includes PSR Committee members)	imprisonment for up to 2 years
Health Insurance Act s106ZR	disclosure of Committee deliberations	imprisonment for up to 12 months
Health Insurance Act s130	officers to observe secrecy	fine of up to \$500

Civil action for breach of confidence

- 5.2.2 A PUR or another person affected by a breach of confidence (e.g. a patient) could take a civil action for breach of confidence against the Commonwealth, or a Committee or staff member personally, if unauthorised use is made of confidential information about that person.
- 5.2.3 The action could seek damages from the person sued and/or an injunction (e.g. to prevent further disclosure or use).

Privacy Act

- 5.2.4 The Commonwealth *Privacy Act 1988* applies to Commonwealth agencies including PSR.
- 5.2.5 It imposes obligations concerning the collection, use, disclosure and storage of personal information.
- 5.2.6 Generally, personal information must only be solicited for authorised uses, must be stored securely, must only be used for the purposes for which it was collected, and must not be passed on without authority. There may be a breach of the Privacy Act if information about a PUR was misused.

Crimes Act

- 5.2.7 It is an offence, under section 70 (Disclosure of information by Commonwealth officers) of the *Crimes Act 1914*, for current and former Commonwealth officers to disclose, without authority, confidential information or documents gained in the course of their duties (penalty **2 years** imprisonment). [s 70 CA]
- 5.2.8 PSR Committee members would be Commonwealth officers for this purpose.

Health Insurance Act

- 5.2.9 Committee meetings are to be held in private. This means they are not open to the public and the Chairperson should only allow those people with a role in the process to be present (which does not include supporters of the PUR). [s 98]
- 5.2.10 It is an offence to disclose Committee deliberations except to a lawyer (penalty **12 months** imprisonment). This would include Committee evidence, transcripts, documents and unrecorded discussions. [s 106ZR]
- 5.2.11 Current and former officers must not, directly or indirectly, except in the course of their duties, powers or functions under the Act, record, or divulge or communicate any information about the affairs of another person which has been acquired in the course of their duties, powers or functions (penalty \$500). (Various subsections permit disclosure in the course of carrying out duties and for particular purposes.) [s 130]

Consequences of a breach

- 5.2.12 The consequences, for PSR, of a breach of confidentiality may be very serious. It could mean:
- (a) either a third party (e.g. patient whose records were disclosed) or the PUR could seek damages and/or injunctions;
 - (b) the PUR could use an unauthorised disclosure about the PUR as a basis for allegations of bias;
 - (c) the PUR could use evidence of bias to have the courts set aside Committee conclusions;
 - (d) a Committee member may need to resign, with the flow on effect that the PUR's consent is needed for the remaining Committee members to continue to consider the PUR's conduct. If this consent is not given, the Director will need to appoint a new committee, involving considerable cost and delay; [s 96A]
 - (e) the PSR process is brought into disrepute; and/or
 - (f) there may be serious adverse publicity from any trial.

5.3 Legal Assistance from the Commonwealth

- 5.3.1 Committee members and staff can expect some support from the Commonwealth Government if sued in connection with PSR duties. Under the Legal Services Direction 2005 approved by the Attorney-General, the Commonwealth will normally assist an official to defend legal proceedings where:
- (a) the proceedings arose out of the official's Commonwealth employment; and
 - (b) the official acted reasonably and responsibly.

- 5.3.2 The Commonwealth will never support an official initiating defamation proceedings.

5.4 Contempt and Immunities

Contempt

- 5.4.1 It is an offence for a person to:
- (a) obstruct or hinder a Committee or a member in performance of Committee functions; or
 - (b) disrupt a Committee hearing. [s 106EA]

- 5.4.2 It is likely that these provisions will at least protect Committees and members from physical obstruction, hindrance or disruption. Whether they will protect them from oral obstruction, hindrance or disruption (e.g. refusal to stop speaking or refusal to give responsive or meaningful answers) will depend on the particular circumstances.
- 5.4.3 A person who obstructs or hinders a Committee or a member, or who disrupts a Committee hearing, should be asked to desist and be warned that legal action will be taken if they do not. Such legal action may include referral of the person to police for possible prosecution. Accordingly, details of the obstructive, hindering or disruptive behaviour, of warnings, and of any responses should be carefully recorded at the time.

Immunities

- 5.4.4 A Committee member, in performing Committee duties, has the same protection and immunity as a Justice of the High Court. [s 106F]
- 5.4.5 A person appearing on behalf of another person has the same protection and immunity as a barrister appearing for a party in proceedings in the High Court.
- 5.4.6 A witness has the same protection and liabilities (in addition to penalties under the Act) as a witness in proceedings in the High Court.
- 5.4.7 A consultant to the Committee who gives it a document, but does not appear as a witness, is protected from criminal and civil actions and proceedings.

Suggested Opening Statement

SUGGESTED OUTLINE FOR OPENING STATEMENT BY CHAIRPERSON OF PROFESSIONAL SERVICES REVIEW COMMITTEE No. [XXX]

[NAME OF PUR]

CHAIR

I declare this hearing of Professional Services Review Committee No. XXX open at TIME on DATE. I am CHAIR'S NAME. I am a medical practitioner and the Committee Chair. This is MEMBER and MEMBER who are SPECIALTY practitioners. Thank you for attending, PUR.

I note you are accompanied. Would you please introduce those accompanying you and tell us the capacity in which they are here?

Hear

OR

I note you are unaccompanied. Would you please confirm that you received a letter from the Case Manager dated DATE informing you of your rights, including the right to be accompanied by a lawyer or another adviser.

Hear

For the record, I will state that apart from the Committee, yourself and your adviser/s, the only persons here are:

- NAME who is the Committee's legal adviser
- NAME who is the Case Manager
- NAME who is the assisting the Case Manager
- NAME from Auscript, who is recording the proceedings.

Explanation of Referral

PUR, you are here today because of a referral to this Committee from the Director of Professional Services Review under section 93 of the *Health Insurance Act 1973*. You have previously been provided with a copy of that referral.

PUR, the Committee has been asked to consider whether you have engaged in inappropriate practice as defined in section 82 of the Act. That is, the Committee must look at whether your conduct in connection with the provision of MBS services during the review period would be unacceptable to the general body of SPECIALTY.

The referred services are all services provided by you at or from your practice locations in Australia during the review period, being DATE to DATE inclusive. This is at paragraph NUMBER, page NUMBER of the Referral. The Committee intends to examine the services identified in the lists attached to the Schedule to the Notice to Produce Documents dated DATE.

I remind you that sub section 106H(3) of the Act provides that the Committee's investigation is not limited by the reasons set out on page NUMBER of the Referral.

The Act also requires this Committee to have regard to whether you kept adequate and contemporaneous medical records. Sub section 82(3) of the Act states:

“A Committee must, in determining whether a practitioner's conduct in connection with rendering or initiating services was inappropriate practice, have regard to (as well as to other relevant matters) whether or not the practitioner kept adequate and contemporaneous records of the rendering or initiation of the services”.

The Health Insurance (Professional Services Review) Regulations 1999 sets out the standard for records to be considered adequate and contemporaneous.

Do you have any questions at this stage?

Hear and respond

Outline of Proceedings

The Case Manager will shortly tender certain documents into evidence. You may view any of the documents at any time today. You will also be given the opportunity to tender any documents that you consider to be relevant.

After the tendering of exhibits you will be asked to take an oath or affirmation. We will ask you some general questions about your practice and then we will then ask you questions about the rendered services. As we progress, the Committee members will alternate questioning.

Adjournment, if required

If you require a short adjournment at any stage, please let me know.

Although the Committee may adjourn the proceedings from time to time to confer, it is proposed that the Committee will adjourn at TIME for morning tea and at TIME for lunch.

Opportunity to address Committee (either orally or in writing)

PUR, you also have the right to address the Committee. Please feel free to ask questions or to make any comments, at any time. Your lawyer has the right to give you advice and address the Committee on questions of law. At the conclusion of the hearing, the Committee will give you and your lawyer or adviser the opportunity to address the Committee.

Committee's report

After the conclusion of the hearing, the Committee will prepare its report. In accordance with section 106KD(3) of the Health Insurance Act 1973, the Committee will provide you with this draft report. You will then have a period of one month after the draft report is given to you to make written submissions suggesting changes to the draft report.

Any submissions you do make will be considered by the Committee before preparing its final report and then a copy will be provided to you and the Director of Professional Services Review.

If findings of inappropriate practice are made, not earlier than one month after the final report is given to you and the Director of PSR, it will be forwarded to the Determining Authority. This period allows you time to seek judicial review if you wish.

Other important aspects of process

There are a few other aspects of the process which I would like to draw to your attention:

- It may be a criminal offence for you to knowingly give a false or misleading answer to a question or to produce a document containing a false or misleading statement which you do not tell us is false or misleading.
- This is a private hearing and any information concerning your affairs or the affairs of any other person may not be disclosed outside this room unless the Act specifically authorises disclosure.
- You will need to make your own arrangements with the recording service should you require a recording or a transcript of the proceedings. The Case Manager will provide you with the contact details for Auscript.

That concludes my outline of the proceedings.

PUR, do you have any questions at this stage?

If yes, hear and address

If no Thank you.

Receive documents into evidence

PUR, I will now commence receiving documents into evidence. You may view any of the documents at any time today. You will also be given the opportunity to tender any documents that you consider to be relevant.

CASE MANAGER:

As Case Manager to Professional Services Review Committee No. XXX I tender the following documents:

A copy of PSRC Referral No. XXX, PUR, Volume 1 of 1, containing:

- the Instrument under sections 93 and 95 of the *Health Insurance Act 1973*, establishing Professional Services Review Committee No. XXX, signed by Dr Tony Webber, Director of Professional Services Review on DATE
- Attachment A titled Terms of Sections of the Act
- Attachment B titled Report of the Director Professional Services Review
- Appendix 1 Medicare Australia's Request to Review No. XXX dated DATE.

CHAIR:

That will be Exhibit number 1

CASE MANAGER:

The Notice to Produce Documents under section 105A of the Act dated DATE requiring PUR to produce medical records to the Case Manager.

CHAIR:

That will be Exhibit number 2

CASE MANAGER:

The Notice of Hearing under section 102 of the Act dated DATE, the Notice to Produce Documents under section 105A of the Act dated DATE requiring PUR to produce medical records to the Committee at the hearing and a covering letter also dated DATE from the Case Manager to PUR providing him/her with an outline of these proceedings.

CHAIR:

That will be Exhibit number 3

CASE MANAGER:

The medical records for Lists X, X, X and X.

CHAIR:

That will be Exhibit number 4

CASE MANAGER:

XXXXX

CHAIR:

That will be Exhibit number 5

CASE MANAGER:

I have no further documents to tender at this stage. All other documents tendered into evidence will be allocated exhibit numbers so they can be readily identified. For the record, I would like to state that all documentation before the Committee is also before PUR.

CHAIR:

PUR, do you have any documents you would like to tender at this stage?

If yes, tender documents and allocate exhibit number

PUR, do you have any questions at this stage?

If yes, hear and address

If no Thank you.

Administration of oath or affirmation

PUR, as evidence at this hearing will be taken under oath or affirmation, would you prefer an oath or affirmation?

Administer the oath or affirmation

Proceed to foundation questions

Appendix – Adjournments & Closing Statements

SUGGESTED FORM OF WORDS TO ADJOURN HEARING

CHAIRPERSON:

I adjourn this hearing until [TIME] on [DATE] (if the hearing is to be adjourned until a later date) at [give new PLACE if there is to be a change or say it will be advised].

SUGGESTED FORM OF WORDS TO RESUME HEARING

CHAIRPERSON:

I resume this hearing at [TIME] and, if appropriate, [DATE]. Those present are the same as before the adjournment.

SUGGESTED OUTLINE OF CLOSURE OF FINAL SITTING

CHAIRPERSON:

1. Resume

- State the time at which the hearing is resumed.
- Note those present (eg: "those present are the same as at the adjournment")

2. Last Sitting

- Inform the PUR that it is likely that this will be the last sitting required by the Committee before it prepares its draft report
- Note that after the Committee has considered all the evidence, it may request another sitting. Note that the PUR may also request a further sitting to make further oral submissions.
- Explain that the hearing will be adjourned indefinitely to leave open the possibility of calling a further sitting if required
- Has the PUR undertaken to provide any documentation / information to the Committee? If so, remind the PUR what it is.

3. Questions or Comments from PUR?

- Does the PUR have any [further] comments on today's proceedings?
- Does the PUR have anything further they wish to say before the Committee adjourns?

4. Adjournment

- Adjourn the hearing of the Professional Services Review Committee No. [XXX] at [TIME].