



**Deputy Premier of Western Australia  
Minister for Health; Tourism**



Our Ref: 25-26331

Senator Helen Polley  
Chair  
Senate Finance and Public Administration Committee  
Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Senator

**INQUIRY INTO NATIONAL HEALTH REFORM AMENDMENT (ADMINISTRATOR AND NATIONAL HEALTH FUNDING BODY) BILL 2012**

Thank you for your letter of 22 March 2012 inviting the Western Australian Government to make a submission to the Senate Standing Committee's Inquiry.

The Commonwealth's *National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012 (Clth)* and proposed State Bills are part of a cooperative legislative scheme providing for the appointment and conferral of functions and powers on the person separately appointed under those Bills as the Administrator of the National Health Funding Pool.

This is an important component of the overall reform of public hospital financing arrangements under the National Health Reform Agreement (NHRA). It provides for the establishment of an independent Administrator who will oversee payments of State and Commonwealth money for public hospital services on behalf of respective governments into State pool accounts which, collectively, will form the National Health Funding Pool.

Western Australia's agreement to the NHRA was predicated on the State retaining complete and exclusive control over its funding for public hospital services through the pool funding arrangement at all times. This requirement is clearly reflected in the design and provisions of the funding pool scheme set out in the NHRA.

As provided for under the NHRA, each State pool account will be established and controlled by the relevant State legislation, not Commonwealth legislation. When performing the functions of the Administrator of each State pool account, the Administrator is a statutory office-holder of the relevant State and not the Commonwealth. For this reason, the Administrator will be appointed separately by all States and Territories and by the Commonwealth pursuant to relevant State or Commonwealth legislation to perform the functions identified in the NHRA. This arrangement is complex, but a consequence of the Commonwealth's desire to create a national funding pool for hospital funding.

Importantly for Western Australia, the NHRA is unambiguous that funds held in State pool accounts, whether sourced from the Commonwealth or a State, are to form part of the State's revenue and their release to public hospitals is to be controlled by the State. That is, for example, the Administrator, as the administrator appointed under the Commonwealth legislation, will not exercise any State statutory powers or functions or be capable of doing so.

The Western Australian Government has to some extent been consulted in the development of the Commonwealth Bill. Its content is generally consistent with the NHRA signed by members of the Council of Australian Governments (COAG) in July 2011.

However, despite the clear policy position reflected in the NHRA, there is a very real concern regarding the interaction between the States' and Commonwealth's legislation providing for the appointment of the Administrator, and the exercise of the Administrator's powers and functions under the proposed Commonwealth legislation.

For example, clauses B26 and B27 of the NHRA clearly distinguish between the functions to be performed by the Administrator appointed under Commonwealth law and the functions to be performed by the Administrator appointed under State law. In the draft legislation introduced into the Commonwealth Parliament, there is a statement of the functions to be performed by the Administrator appointed under Commonwealth law. Clause 238 of the Bill refers. This statement of functions is the same as is expected to be identified in State legislation providing for the appointment of the Administrator by each State. To the extent that the Administrator can under the Commonwealth Bill exercise (or have conferred on him/her by State legislation) State powers and functions, there is a clear inconsistency with the NHRA.

One of Western Australia's concerns is that this situation will result in the Commonwealth legislation, even if inadvertently, conferring functions and powers on the Commonwealth-appointed Administrator in relation to the control of funds in the State pool account. Further, Western Australia believes it is critical to reduce the potential for confusion through the clear delineation of functions the Administrator will discharge on behalf of the Commonwealth Government from those the person will be required to discharge on behalf of each State/Territory Government. This will require amendment to the Commonwealth Bill to more clearly delineate the functions to be performed by the Commonwealth-appointed Administrator in a manner that is consistent with clauses B26 and B27 of the NHRA.

On a related matter, Western Australia considers that clause 248 of the Commonwealth Bill is unnecessary in relation to the Administrator's appointment. This clause is intended to address the consequences of the High Court's decision in the *Hughes* case, where the High Court ruled that an officer of the Commonwealth may only be conferred with powers and functions under a State Act with the express agreement of the Commonwealth Parliament.

In Western Australia's view, the inclusion of this provision is inconsistent with the NHRA which clearly contemplates that the Administrator will be appointed jointly and severally by all jurisdictions in their own right. It is clearly within the legislative competence of the Western Australian Parliament to provide for the appointment and conferral of powers and functions on the Administrator of the Western Australian State pool account. Such legislation does not involve conferring powers or functions on a Commonwealth officer, and no such acquiescence by the Commonwealth Parliament is required. Retaining the provision in the Bill will confuse the policy intent of the NHRA, not provide the clarification intended. It may also have the consequence of inviting States to confer State powers and functions on the Administrator appointed under the Commonwealth legislation which would clearly be contrary to the co-operative structures and arrangements agreed to in the NHRA.

State officials are endeavouring to work through these issues with Commonwealth officers, with a view to amendments to the Commonwealth Bill being agreed to ensure that both the Commonwealth and State legislation is consistent with the intent of the NHRA.

The Western Australian Government is anxious that your Committee should support amendments to this Commonwealth Bill to address the above issues to ensure that the NHRA is implemented and can operate as intended by COAG.

Yours sincerely

Dr Kim Hames MLA  
**DEPUTY PREMIER**  
**MINISTER FOR HEALTH**

13 APR 2012