

24.02.2022

Senator Wendy Askew  
Chair  
Senate Community Affairs Legislation Committee  
Parliament of Australia  
Canberra ACT 2600

Email: [Community.affairs.sen@aph.gov.au](mailto:Community.affairs.sen@aph.gov.au)

Dear Senators of the Senate Standing Committees on Community Affairs,

**RE: Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021  
[Provisions]**

**Introduction**

The Royal Australasian College of Surgeons (RACS) welcomes the opportunity to provide a submission to this public consultation in relation to the legislative amendments proposed. RACS is the leading advocate for surgical standards, professionalism and surgical education in Australia and New Zealand. RACS supports the ongoing development, maintenance of expertise and lifelong learning that accompanies the surgical practice of more than 7,000 surgeons and 1,300 surgical trainees and Specialist International Medical Graduates (SIMGs).

**Background**

Proposed amendments to the *Health Insurance Act 1973* (the Act) to provide greater power to the Professional Services Review (PSR) has been brought to the attention of RACS. The following items more broadly speaking has raised our concerns.

- **Inappropriate Practice ss 81(1), 86(1), 92(1) & 92(2)(cb), 93(1) & 106ZPR(1)(c) and (d):** Provide power to the PSR to enter into an agreement with a person or body corporate who is under review and who have acknowledged that they had committed an 'inappropriate practice' under the law with respect to inappropriate billing by practitioners under the MBS or prescribed under the PBS.
- **Notice to Produce (NTP) s 106ZPNA:** Introduce new sanctions for person who fail to respond to a notice to produce documents to the Director of the PSR or to a PSR Committee or fail to appear at hearings for the purpose of providing for the recovery of interest payable on certain debts; the application of administrative penalties to Shared Debt Recovery Scheme debts.

Historically the PSR had reached out to RACS back on 21 November 2020 to inform us that they had "received referrals from practitioners related to your specialty." A meeting was conducted in Canberra between representatives of RACS and the PSR on 1 December 2020. Following that, RACS produced a preliminary submission which addressed aspects of this current bill relating to the



power of the PSR on 27 November 2020 when the matter was an inquiry into the *Health Insurance Amendment (Compliance Administration) Bill 2020*. RACS has also written to the Department of Health Business Integrity and Digital Health Division on matters relating to Notice to Produce back on 5 July 2021.

#### **GENERAL CONCERN**

A general concern is whether this Bill would contribute towards creating an unnecessary blunt punitive instrument. Electronic errors may occur due to numerous online and mobile processing systems which would encompass a bank's EFTPOS terminal or Easyclaim within a medical practice. Another example relates to duplicate payments for public hospital services. A third example would be when claims are forwarded for payment by administrative staff in error either in private practices or public hospitals without the express knowledge of the practitioner involved. RACS fully supports that there is a need for Medicare to be able to investigate claims that are felt to be concerning and to recoup any monies paid in error, however the emphasis needs to be on natural justice and judicial fairness. Many errors that occur within the current system are indeed errors rather than intentional acts deliberately aimed at defrauding Medicare. As such RACS remains very concerned that a simple error, often by clerical or administrative staff would lead to an assumption of deliberately fraudulent action on the part of the surgeons involved, leading to prosecution or publicly available reputational damage.

Hence RACS supports the following on behalf of our fellowship-

- Procedural Fairness and the Right to an Appeal
- Errors Misconstrued as False or Deliberately Misleading

#### **INAPPROPRIATE PRACTICE**

Under s82 of the Act the PSR has been granted discretionary powers to determine what is an inappropriate practice. The Professional Services Review scheme (PSR) established in 1994 under the Act, have great power, among them being:

- to investigate a medical practitioner,
- the requisition of medical records,
- and to "compel answers under oath in a formal hearing and recommend a range of sanctions which include prosecution."

The PSR is a heavy instrument, and historically it has been shown that doctors "fight vigorously" to defend their reputation against fraud charges with the assistance of their medical defence organisations. In its earlier manifestation, the PSR reported that between 1994 to 2005 they had 447 referrals where actions were taken. To resolve each action the PSR scheme cost on average \$70,000 per referral<sup>i</sup> or \$31,290,000 in total.

Laws under the *Health Practitioner Regulation National Law* s136 already exist to deter external influences from corporate directors or managers to direct or incite their registered health practitioner employees to practise in ways that would constitute unprofessional conduct or professional misconduct.<sup>ii</sup>

Furthermore, what does "agreement" mean in relation to the new powers granted the Director of the PSR? First there needs to be an acknowledgement of inappropriate practice which in effect is an admittance of guilt. In the Bill Digest, "agreement" would include counselling and education, and actions required to produce information the PSR seeks.<sup>iii</sup> But can an "acknowledgement" result in a recorded adverse finding on a practitioner, or is it a form of unrecorded caution?

As mentioned above, RACS remains keen that discrepancies are brought to the attention of a practitioner, with an assumption of innocence rather than guilt of a deliberately fraudulent act. Where appropriate, reimbursements should occur with no adverse findings against practitioners in any way unless clearly proven to be repeated fraudulent behaviour.

### **NOTICE TO PRODUCE (NTP)**

Compliance to a NTP is a legal requirement under section 129AAD of the Act.<sup>iv</sup> However, there remains some confusion as to how this law clashes with that of the Australian Privacy Principles (APP), in particular APP 6.<sup>v</sup> Any NTP letter from the MBS Compliance Division may also include providing documentation containing patient information. By doing so the surgeon may then be non-compliant with APP 6.

Disclosure of personal information to a person is allowed if it can be shown that there is a "sufficient interest in the health and welfare of a person, such as a general practitioner who has responsibility for the continuing care and treatment of an individual."<sup>vi</sup> This was demonstrated in the case of *F v Medical Specialist* [2009] PrivCmrA 8 (31 August 2009). Under APP 6 this is an example where a "secondary purpose is directly related to the primary purpose of collection."<sup>vii</sup> In conclusion, does the act of complying to a NTF interfere with a patient's privacy under both the APP 6 and in statute law section 41(1)(a) of the *Privacy Act 1988* which relates to interference?<sup>viii</sup>

On 19 August 2021, the Department of Health responded to the question posed by RACS above in a letter. The response simply highlighted the fact that s129AAD of the Act enables the Chief Executive of Medicare to issue a notice if there is a suspicion that an incorrect claim had been made, and that the Department was bound by the *Privacy Act 1988*, APP 1, and their Privacy Policy ([Here](#)).<sup>ix</sup> This response from the Department didn't shed a clearer light on our concerns. Informal discussions had with MDOs like AVANT, and MIGA suggested that the NTP within this context may override patient privacy, but that it may not have been legally tested in case law.

### **CONCLUSIONS**

The following has already been expressed in the earlier submission written by RACS dated 27 November 2020. Considering this Bill and the Act, RACS believes in the core value of natural justice or *audi alteram partem*, "let the other side be heard as well". What appears to be lacking is a set of clear guidelines for the rippling after-effect these amendments will have on the surgical profession. The following are in summary RACS' primary concerns regarding this Bill.

- The principle of reimbursement is reasonable if an error has been made
- The principle of Medicare not having to notify the practitioner what the error is, is not acceptable from a procedural fairness viewpoint
- Right of objection/appeal needs to be part of this legislation
- Clear distinction needs to be made of an error requiring reimbursement, from a deliberate act of fraud as an honest error could be made inadvertently by the practitioner, practice staff or public hospital staff
- Errors identified should be disclosed to practitioners and a request for reimbursement made that is not associated with litigation, punitive or unfair damage to reputation
- Repeated errors leading to suspicion of fraudulent behaviour may require a different framework

Yours sincerely,

**Prof Mark Frydenberg**  
Chair, Health Policy & Advocacy Committee

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<sup>i</sup> Healy, Judith (editor)., *Improving Health Care Safety and Quality, Reluctant Regulators*, Chapter 8 "Regulation by Enforcement: Laws, Money and Monitoring" Publishers Taylor & Francis, 2016 pp.266-267

<sup>ii</sup> *Health Practitioner Regulation National Law (Victoria) Act 2009*, s136 Directing or inciting unprofessional conduct or professional misconduct

[http://classic.austlii.edu.au/au/legis/nsw/consol\\_act/hprnl460/s136.html](http://classic.austlii.edu.au/au/legis/nsw/consol_act/hprnl460/s136.html)

<sup>iii</sup> Bills Digest No.31, 2021-22., *Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021* by Leah Ferris of the Law and Bills Digest Section pp.8-10 [Bills Digest no. 31 \(2021-22\) - Health Legislation Amendment \(Medicare Compliance and Other Measures\) Bill 2021 \(aph.gov.au\)](#)

<sup>iv</sup> HEALTH INSURANCE ACT 1973 - SECT 129AAD Notice to produce documents, [HEALTH INSURANCE ACT 1973 - SECT 129AAD Notice to produce documents \(austlii.edu.au\)](#)

<sup>v</sup> Chapter 6: APP 6 — Use or disclosure of personal information, Office of the Australian Information Commissioner [Chapter 6: APP 6 — Use or disclosure of personal information — OAIC](#)

<sup>vi</sup> *F v Medical Specialist [2009]* PrivCmrA 8 (31 August 2009) [F v Medical Specialist \[2009\] PrivCmrA 8 \(31 August 2009\) \(austlii.edu.au\)](#)

<sup>vii</sup> Chapter 6: APP 6 — Use or disclosure of personal information, Office of the Australian Information Commissioner, see 6.27 [Chapter 6: APP 6 — Use or disclosure of personal information — OAIC](#)

<sup>viii</sup> PRIVACY ACT 1988 - SECT 41 Commissioner may or must decide not to investigate etc. in certain circumstances [PRIVACY ACT 1988 - SECT 41 Commissioner may or must decide not to investigate etc. in certain circumstances \(austlii.edu.au\)](#)

<sup>ix</sup> Australian Government, Department of Health., *Privacy Policy*, October 2020, <https://www.health.gov.au/sites/default/files/documents/2021/04/privacy-policy-privacy-policy.pdf>