Australian Government
Department of Health

Inquiry into the Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021

Submission from the Department of Health
to the Senate Community Affairs Legislation Committee

18 February 2022

Contents

Introduction

The Department of Health (the department) welcomes the opportunity to provide a submission to the *Senate Community Affairs Legislation Committee Inquiry into the Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021*.

The submission provides background on the department's health provider compliance framework and the Professional Services Review (PSR) process, sets out the necessity of the Bill's provisions and provides information about the Bill's safeguards.

Background

Context

The department is responsible for protecting the integrity of Australia's health payments system comprising the Medicare Benefits Schedule (MBS), the Pharmaceutical Benefits Scheme (PBS) and the Child Dental Benefits Schedule (CDBS). The ongoing viability of these programs is of the utmost importance to the Commonwealth. These programs have a significant impact on the Commonwealth's finances (for example, expenditure in 2020–21 ran to more than $42 billion, up from $38 billion the year prior) and are integral to Australia's world class health system.

The department fulfils its responsibility through the prevention, identification and treatment of incorrect claiming, inappropriate practice and fraud by practitioners and other health care providers (including corporate entities). While the vast majority of practitioners claim benefits correctly and appropriately, a few do not. Some claims do not meet legislative requirements, while others relate to inappropriate practice or are fraudulent. These claims not only compromise taxpayer funding but also a patient's ongoing access to health services. The department's and the PSR's compliance activities protect Commonwealth expenditure enabling further investment in Australia's health programs, ensuring all Australians are able to access essential health services when and where required.

The department recognises that the majority of practitioners do the right thing and accordingly provides a responsive and proportionate approach to its compliance activities. Most of these activities centre on fostering voluntary compliance through a strong focus on education, engagement with professional colleges and other peak bodies, and letters targeted to practitioners with unusual or unexpected patterns in claiming payments or requesting diagnostic services.

When significant and persistent non-compliance exists, the department has three main avenues to address the behaviour. Where an audit of claims and supporting documents finds that due to the provision of false or misleading information, an amount has been paid in excess of that which should have been, the department seeks to recover the amount. The department may also refer practitioners to the statutorily independent PSR for suspected inappropriate practice and finally where fraud is suspected the department may conduct criminal investigations to build a brief of evidence for the Commonwealth Director of Public Prosecutions.

Proposed amendments

Summary

The Bill **addresses inappropriate practice** by expanding the options available to the PSR to make agreements with any person under review who acknowledges inappropriate practice, including corporate entities; and introducing new sanctions for persons who fail to respond to a notice to produce documents to the Director or to a PSR Committee, or fail to appear or answer questions at a hearing.

The Bill also **protects the integrity of payment systems** by improving recovery arrangements for debts owed to the Commonwealth, aligning the relevant standards and arrangements across the MBS, PBS and CDBS, and clarifying the application threshold for administrative penalties within Shared Debt Recovery Scheme arrangements.

Addressing inappropriate practice

The PSR scheme, set out in Part VAA of the *Health Insurance Act 1973*, uses a process of peer review to examine the possible inappropriate practice of a referred person. Inappropriate practice is defined in section 82 of the HIA. In broad terms, inappropriate practice is conduct by a practitioner in connection with rendering or initiating services that the practitioner's peers could reasonably conclude was unacceptable to the general body of their profession.

Once a person is referred to the PSR by way of a request for review from the Chief Executive Medicare (CEM), the Director of the PSR (the Director) must make a preliminary decision whether to undertake a review. The Director must decide whether to review but must undertake a review if, based on the information available to the Director, it appears that there is a possibility that the person has engaged in inappropriate practice in providing services during the review period. If the Director decides to undertake a review, the Director can refer the person under review to a Committee of their peers (PSR Committee) or enter into a written agreement with the person under review. The Director may also decide to take no further action following review.

Historically, health provider compliance, including the PSR scheme, has concentrated on the behaviour of individual practitioners. Although the PSR scheme allows for review of persons (including corporate entities) who employ or otherwise engage practitioners, certain provisions currently apply only in circumstances where the person under review is a practitioner. This includes provisions allowing the Director to enter into a written agreement with the person under review, and certain sanctions that relate to the person under review failing to produce documents or attend hearings when required. In addition, sanctions that may be applied to corporate entities for failing to produce documents subject to a notice to produce, such as disqualifying each practitioner employed or otherwise engaged by that corporate entity, are not always suitable. The influence of corporate entities on the provision of health care services is growing and this changing environment has made it necessary to adapt certain compliance arrangements to ensure the ongoing integrity of the Medicare compliance framework.

The Bill therefore proposes amendments to ensure all persons under review by the PSR, including corporate entities, may make written agreements with the Director acknowledging inappropriate practice and agreeing to specified actions such as reprimand, repayment and/or disqualification from providing specified services. The Bill also introduces certain sanctions to be applied to persons under review who are not practitioners. In particular, the

Bill extends the application of the existing criminal offence in section 106ZPN of the HIA to all persons (other than persons under review who are practitioners) who fail to produce documents or give information to the Director or to a PSR Committee after receiving a notice. The sanctions also include a civil penalty for corporate entities who do not produce documents or give information when required, and the ability for the Director to seek court orders requiring the production of documents. The Bill also introduces criminal offences for persons under review (other than practitioners) who are given a notice to appear at a PSR Committee hearing but fail to appear (or appear but refuse or fail to give evidence or answer questions asked at the hearing).

The proposed amendments within the Bill account for situations where corporate entities may not have one executive officer who is independently able to answer all questions when giving evidence at a hearing and allows the executive officer to call other individuals to answer questions. This ensures that PSR committees may hear evidence from the person in the corporate entity best placed to provide it.

The amendments are made in acknowledgment of their potential impact on smaller businesses, that not all corporate entities have the same size or structure, and that some health practitioners practising solo may choose to incorporate, that is, practise as corporate entities. The provisions also recognise situations where corporate entities may have only one executive officer who is also a practitioner, such as by extending medical exemptions from attending hearings, which currently only apply to individual practitioners, to executive officers of corporate entities in specific scenarios. These safeguards demonstrate that the amendments are not intended to be punitive but rather aim to encourage co-operation with the PSR process, in order to enable the provision of information and evidence to enable the PSR to undertake its functions.

The Bill also clarifies that the CEM can request that the Director review a person's provision of services if it appears to the CEM there is a possibility that the person had engaged in inappropriate practice. In making the referral, the CEM is not required to objectively determine that a particular person provided the services and/or engaged in inappropriate practice. The CEM does not have any compulsory powers which would enable them to make such determinations. Similarly, while the Director may decide to undertake a review, the Bill clarifies that the Director may also refer a person under review to a PSR Committee if it appears to the Director that the person may have engaged in inappropriate practice. It has never been part of the PSR scheme for the CEM to have made any findings prior to referring a person's provision of services to the Director, nor for the Director to have made any findings prior to referring a person to a PSR Committee.

The Bill also enables the CEM to notify the PSR Director of the CEM's opinion that there has been non-compliance with a section 92 agreement. The Director then has a discretion to publish details in relation to the person under review and the inappropriate practice that was the subject of the agreement. As section 92 agreements are ordinarily confidential, this is intended to act as a deterrent to persons under review not taking specified actions as per the terms of their agreement. In this instance the person under review has the opportunity to make submissions as to whether they have taken action specified in their agreement prior to the CEM notifying their opinion to the Director.

Protecting payment integrity

The Bill includes amendments to update and clarify the legislative provisions across the HIA, the *National Health Act 1953* (NHA) and the *Dental Benefits Act 2008* (DBA) including to clarify:

- the recovery of interest payable on certain debts under the HIA and DBA;
- application of administrative penalties to Shared Debt Recovery Scheme debts;
- use of the financial information gathering powers in debt recovery;
- Administrative Appeals Tribunal review arrangements, where one or more garnishee notices are issued in relation to certain debts;
- the Commonwealth's ability to recover a debt from a person or the estate of the person.
- to clarify the use of the set off powers in relation to section 92 debts with other debts.

The Bill also expands the HIA's garnishee powers to apply to debts raised under section 92 of the HIA to provide an escalation process to recover a debt, where a debtor has not cooperated with the department to repay their debts.

Finally, the Bill amends the NHA and the DBA to clarify that the Commonwealth can recover an amount as a debt where it should not have been paid due to the provision of false or misleading information (rather than a false or misleading statement), aligning the relevant provisions with their equivalents in the HIA.

Consultation on the Bill

A range of stakeholders were consulted on the measures including the Australian Medical Association, the Royal Australian College of General Practitioners, peak groups, and medical defence organisations.

Broadly, stakeholders supported the Bill's intent to strengthen compliance arrangements for health providers—each organisation raised its own concerns, some with the PSR scheme in general and others with certain provisions. Overall, the core principles of the Bill were generally acceptable to key stakeholders. The department is confident that its ongoing focus on and commitment to compliance education for practitioners, corporate entities and peak bodies will assist stakeholders to understand the new provisions in the Bill and their responsibilities, if any, under the Bill.

Addressing inappropriate practice

Stakeholders expressed concerns regarding the sanctions against persons under review who failed to comply with PSR requests for information. The Bill introduces certain sanctions to be applied to persons under review who are not practitioners. The sanctions include a civil penalty for corporate entities who do not produce documents or give information when required, and the ability for the Director of the PSR to seek court orders requiring persons under review to produce documents. The department understands stakeholders' concerns, but the provision of this information is critical to the PSR's functions. The department considers that condign sanctions for non-compliance are necessary if persons under review are to be encouraged to co-operate and engage with the PSR process so that inappropriate practice may be reviewed fairly and efficiently. The PSR would be unable to undertake

reviews if information were not provided, and the existing sanctions are not always appropriate for corporate entities.

Nevertheless, the department agreed that new sanctions should be proportionate for different persons and established different penalty regimes for practitioners and non-practitioners that fail to appear or answer questions before a PSR Committee, or fail to produce documents to the Director or a PSR Committee. The relevant provisions also expressly recognise corporate entities which have only one executive officer, such as incorporated solo practitioners, including via consideration of medical exemptions as referred to above. As a result of consultation, procedural safeguards are also in place in relation to the potential publication following non-compliance with a section 92 agreement, as the person under review has the opportunity to make submissions as to whether they have taken action specified in their agreement.

Protecting payment integrity

Stakeholders raised questions regarding the application of powers to recover debts from practitioners' estates, concerned about a perceived lack of checks and balances on the Government's actions. The expansion of this power, however, follows the rationale that debts to the Commonwealth, particularly those due because of identified non-compliant or inappropriate actions, as set out in legislative and regulatory arrangements, are not discharged on death.

The department also considered stakeholder concerns regarding the expansion of garnishee powers to debts raised from section 92 agreements. To reflect the intention that garnishee notices would not be used as the first measure in the debt recovery process, the Bill includes an express provision that garnishee notices may only be issued for section 92 debts when the debtor has defaulted on agreed payments or has not entered into an arrangement to pay the debt within a reasonable timeframe from the date the section 92 agreement takes effect (three months by default). This provision will not change how existing garnishee powers apply to other debts.

Stakeholders supported provisions proposing to align the NHA and DBA with the HIA, to clarify that the Commonwealth can recover an amount as a debt where it should not have been paid due to the provision of false or misleading information.

Impact on Practitioners and other Health Providers

The Bill does not expand the scope of the department's compliance powers. Rather, the Bill strengthens the Government's ability to undertake its existing compliance enforcement responsibilities and give the PSR greater flexibility to manage corporate entities, either through negotiation or stronger sanctions for existing powers to issue notices requiring the production of documents.

The Bill does not have any adverse impact on health practitioners practising legitimately as only non-compliant practitioners would be affected. Those (very few) practitioners and corporate entities suspected of inappropriate practice would be subject to compliance enforcement in much the same manner that exists now, except that corporate entities would have the option of coming to agreement with the Director and avoid the resource intensive PSR Committee review process. Those that chose to ignore PSR requests for information, or who fail to attend a PSR Committee hearing or answer questions, would face proportionate sanctions.

The Bill does not burden compliant practitioners but does increase the flexibility and strength of the Government's compliance activities. It also sends a clear message to Australian taxpayers and all practitioner about the Government's strong commitment to protecting the integrity and viability of its health payment systems.

Conclusion

The measures within the Bill will strengthen the department's health provider compliance framework, thus supporting the integrity of Australia's health programs. Stakeholders were consulted throughout the drafting process and a number of provisions were refined or included in the draft to address stakeholder feedback and concerns. Overall, the proposed amendments are reasonable considering the changing provision of healthcare services and the increasing role of corporate entities.