The Senate

Community Affairs Legislation Committee

Provisions of the Health Legislation Amendment Bill 2005

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Senator John Watson	LP, Tasmania
Senator Ruth Webber	ALP, Western Australia
Senator Penny Wong	ALP, South Australia

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HEALTH LEGISLATION AMENDMENT BILL 2005

THE INQUIRY

1.1 The Health Legislation Amendment Bill 2005 (the Bill) was introduced into the House of Representatives on 14 September 2005. On 5 October 2005, the Senate, on the recommendation of the Selection of Bills Committee (Report No. 11 of 2005), referred the provisions of the Bill to the Committee for report.

1.2 In recommending the reference of the Bill to the Committee, the Selection of Bills Committee provided the following issues for consideration.

To examine the provisions of the Bill relating to new powers to set conditions, limitations and restrictions on the circumstances in which Medicare benefits will be payable for health services; in particular to:

a) consider the evidence that these powers are necessary;

b) identify if the Bill provides sufficient mechanisms to ensure that decisions to impose conditions, limitations and restrictions are made in line with scientific evidence;

c) determine the need for appropriate structures to guarantee consumer and expert consultation in the decision making process; and

d) examine the need for appeals mechanisms to prevent arbitrary application of the power.

1.3 The Committee considered the Bill at a public hearing on 13 October 2005. Details of the public hearing are referred to in Appendix 2. The Committee received 33 submissions relating to the Bill and these are listed at Appendix 1. The submissions and Hansard transcript of evidence may be accessed through the Committee's website at http://www.aph.gov.au/senate_ca

THE BILL

1.4 The purpose of the Bill is threefold, namely:

- Schedule 1 of the Bill amends the *National Health Act 1953* to extend until 30 June 2006 the existing arrangements for approving pharmacists to supply medicines subsidised under the Pharmaceutical Benefits Scheme (PBS);
- Schedule 2 of the Bill amends the *National Health Act 1953* to clarify that dependents of contributors to private health funds are covered as well as the contributors themselves; and

- Schedule 3 of the Bill proposes two amendments to the *Health Insurance Act 1973*. The first amendment clarifies the powers to set conditions, limitations and restrictions on items in the Medicare tables, and the second amendment inserts a new power to allow the Minister to determine that Medicare benefits are not payable for certain services rendered in specified circumstances.[1]

1.5 None of the amendments proposed in the three Schedules is expected to have a direct financial impact.[2]

ISSUES

Schedule 1

1.6 Most witnesses supported the amendment to extend the existing arrangements by six months, including the Australian Divisions of General Practice (ADGP), and the Queensland and South Australian Governments.[3] Women's Health Victoria (WHV) and the Women's Centre for Health Matters (WCHM) advised that they 'do not oppose' the amendment.[4]

1.7 Only the Australian Consumers' Association (ACA) voiced an objection. The ACA stated:

> The ACA is strongly opposed to the continuation of the provision which allows the Australian Community Pharmacy Authority (ACPA) to set location rules. This encourages anti-competitive practices between pharmacies and results in higher prices and fewer options for Australian consumers.[5]

1.8 In the second reading speech the Parliamentary Secretary to the Minister for Health and Ageing explained that 'extension of the existing arrangements until the end of 30 June 2006 will enable the government, in consultation with the Pharmacy Guild of Australia, to carefully consider the findings and recommendations of the review in relation to the pharmacy location rules and the role of the ACPA'.[6]

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1 Parliamentary Secretary to the Minister for Health and Ageing, Second Reading Speech, 14.9.05.

2 Explanatory Memorandum, p.2.

3 *Submission* 29, p.2 (ADGP); *Submission* 32, p.1 (Queensland Government), and *Submission* 33, p.1 (South Australian Government).

4 *Submission* 8, p.1 (WHV); *Submission* 18, p.1 (WCHM).

5 *Submission* 20, p.2 (ACA).

6 Parliamentary Secretary to the Minister for Health and Ageing, Second Reading Speech, 14.9.05.

Schedule 2

1.9 Schedule 2 proposes amendments to ensure that both contributors and their dependents are covered by private insurance policies. Witnesses were supportive of the proposed amendment. Women's Health Victoria (WHV) stated:

> We support the proposed amendments in Schedule 2 to ensure that where appropriate cover is purchased, that both the contributors to private health insurance funds, and their dependents, receive insurance coverage.[7]

1.10 The Queensland Government commented:

> Clarification of the provisions of the private health insurance as covering both contributors and their dependents appears an appropriate path to follow.[8]

Schedule 3

1.11 Schedule 3 proposes two changes to provisions within the *Health Insurance Act 1973* relating to the conditions under which Medicare benefits are payable.

1.12 The first set of proposed changes (contained in items 1 – 4) clarify the scope of existing powers in the Health Insurance Act to specify particular conditions under which benefits for certain medical, pathology and diagnostic imaging benefits are payable.

1.13 The second set of changes included in Schedule 3 (contained in item 5) proposes the insertion of a new power in the Health Insurance Act to allow the Minister to determine, by legislative instrument, that Medicare benefits are not payable for certain services provided in specified circumstances.

Schedule 3, Items 1 – 4

1.14 The Health Insurance Act currently allows for the regulations under which the Medicare tables are made to set out rules for the interpretation of the tables. The Parliamentary Secretary stated:

> It has been a long standing practice to specify, in the Medicare tables, conditions that must be met for Medicare benefits to be payable for health services. The amendments remove any doubt as to the validity of such conditions in the tables.[9]

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7 *Submission* 8, p.1 (WHV).

8 *Submission* 32, p.1 (Queensland Government).

9 Parliamentary Secretary to the Minister for Health and Ageing, Second Reading Speech, 14.9.05.

1.15 The National Association of Practicing Psychiatrists (NAPP) raised concerns in relation to the amendment and sought clarification of what would be gained 'by seeking more power'.[10]

1.16 The Department noted that the Office of Legislative Drafting and Publications had suggested that 'it would be more appropriate for the Act to be amended to clarify that these Tables may set conditions, limitations or restrictions on the circumstances in which Medicare benefits are payable for health services and to make clear the regulation making power of the Act'.[11]

Schedule 3, Item 5

1.17 Submissions and witnesses raised concerns about the amendment proposed by Item 5 as it was argued that the proposed new power would enable the Minister to exclude certain services from Medicare benefits.

1.18 The Australian Medical Association (AMA) noted that such an amendment would represent an increase in the Minister's power and stated:

> This amendment would give the Minister a broad power to make a determination to the effect that a Medicare Item in the Schedule shall not be used for the purpose specified in the determination.[12]

1.19 The AMA commented that it was not aware of any major problem in the operation of Medicare which justified the introduction of this new power. It argued that:

> The Minister can remove or amend an item already. The Minister can ask the medical profession to cease using an item for a certain purpose.[13]

The AMA concluded that '…it is just not a problem'.[14]

1.20 The Medical Industry Association of Australia (MIAA) noted that it had not been consulted by DoHA in relation to this Bill. It stated that it was not aware that 'code drift' was a significant issue and doubted that the proposed amendment was the appropriate solution. The MIAA commented that it 'does not support the inappropriate use of MBS items and accepts that there are procedural issues which must be honoured in respect to what is best for patients'.[15]

1.21 The Australian Women's Health Network (AWHN) expressed concern that under the proposed arrangements the Minister would be able to make determinations

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10 *Submission* 27, p.2 (NAPP).

11 *Submission* 25, p.5 (DoHA).

12 *Submission* 15, p. 2 (AMA).

13 *Submission* 15, p. 2 (AMA).

14 *Committee Hansard*, 13.10.05, p.3 (AMA).

15 *Submission* 16, p.1 (MIAA).

without the benefit of the expert advice of the Medical Services Advisory Committee. The Network commented that it was 'concerned to ensure that extensive consultation will take place in relation to the services and procedures reimbursable under Medicare and insists that decisions must be made on the basis of the best scientific advice available, not simply Ministerial prerogative'.[16]

1.22 The Tasmanian Medicare Action Group (TMAG) raised concerns about the proposed extension of Ministerial power.[17] The Hobart Women's Health Centre (HWHC) and Women's Health Victoria (WHV) expressed concern at the impact this amendment could have on women's health as it 'would allow the restriction of certain essential, medically appropriate and safe medical procedures which may be considered by the government as unacceptable'. WHV went on to comment:

> Equity in access to health services, including abortion, should be facilitated by Medicare. Withdraw of Medicare rebates for abortions will not prevent women from having abortions but rather ensure that, like an increasing number of health care services that were previously universal, abortions are available only to those who can afford private health care.[18]

1.23 The Queensland Government objected to the proposed amendment and argued 'any removal of Medicare benefits for a type of medical procedure could shift demand for that service from the private to the public health sector'.[19]

1.24 The Australian Divisions of General Practice (ADGP) gave qualified support for the amendment, and stated:

> Although this relates primarily to Medicare claims on new medical technologies before 'safety' and 'value for money' have been satisfactorily considered by government, caution should be applied in its utilisation. A determination made without due consultation with the health profession, particularly where it relates to general practice, may impact significantly on the community.[20]

1.25 Four submissions, all from individuals, supported the amendment, generally on the basis that they believed that procedures such as abortion should not receive a Medicare benefit and they supported the Minister's right to exclude such services.[21]

1.26 The Department stated that the proposed amendment is designed to enable the Minister to respond more immediately when concerns about possible misuse of MBS items arise.[22] The Department indicated that:

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16 *Submission* 19, pp. 5-6 (AWHN); see also *Submission 31*, (Public Health Association of Australia).

17 *Submission* 3, p.1 (TMAG).

18 *Submission* 8, p.2 (WHV); see also *Committee Hansard*, 13.10.05, p. 7 (WHV).

19 *Submission* 32, p.2 (Queensland Government).

20 *Submission* 29, p.2 (ADGP).

21 *Submissions* 2, 21, 22 and 24.

> Some medical practitioners use existing Medicare Benefits Schedule (MBS) items for new technologies or procedures which were never envisaged when the items were created and which may not yet be proven to be safe, effective or cost effective through the Medical Services Advisory Committee (MSAC) process. With rapid advances in medical technology, it is difficult to anticipate and exclude such medical technologies from being claimed, until they are proven to be safe and effective.[23]

1.27 The proposed amendment will provide 'more flexibility and responsiveness around the introduction of new technologies'. DoHA also indicated that there are mechanisms in place to assess new technologies as new medical technologies or procedures must be assessed by the Medical Services Advisory Committee (MSAC) before they are publicly funded under Medicare. The MSAC advises the Minister on whether new medical services should be publicly funded based on an assessment of their safety, effectiveness and cost effectiveness, using the best available evidence. DoHA went on to state:

> The rationale for the proposed legislative change is to preserve the evidence based approach to the use of MBS items. The proposed amendment will provide the Minister with a power to exclude medical procedures from Medicare funding until the scientific evidence has been gathered. [24]

1.28 The Department also noted that the Minister already has powers in regard to specific items. DoHA explained that twice a year the General Medical Services Table is amended. Items may be revised, added to or removed. The Bill gives flexibility in the interim periods as information from the Health Insurance Commission about specific cases had indicated 'a spike in utilisation of items that had not had much activity at all'. The Department noted that 'suddenly there was an unexplained spike in utilisation that equated to a new technology that was in the process of going through MSAC but was sneaking onto the schedule and then sneaking into practice without having that cost-effectiveness analysis concluded'.[25]

1.29 On 14 October 2005 it was reported that the Minister was reconsidering whether this amendment was necessary and that discussions were being held with the AMA.[26] Subsequently, on 2 November, the House of Representatives passed amendments to the Bill to omit Schedule 3, Item 5.

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22 *Submission* 25, p.5 (DoHA).

23 *Submission* 25, p.5 (DoHA).

24 *Submission* 25, p.6 (DoHA).

25 *Committee Hansard*, 13.10.05, p. 15 (DoHA).

26 *The Australian Financial Review*, 14.10.05 'Abbot gives up rebate power'.

Recommendation

The Committee reports to the Senate that it has considered the Health Legislation Amendment Bill 2005. The Committee notes the amendments to the Bill made by the House of Representatives and recommends that the Bill be passed as amended.

Senator Gary Humphries
Chairman

November 2005

ADDITIONAL COMMENTS

Australian Labor Party and Australian Democrats

Health Legislation Amendment Bill 2005

The Labor and Australian Democrats members of the Committee concur with the final recommendation of this report.

However, given that we would not have been able to agree to the Bill as it was originally referred to the Committee, we feel it is important that we add our additional comments.

This Bill as referred to the Committee is a mix of amendments, some of which are merely technical clarifications, one of which potentially impacts on the outcome of the Fourth Pharmacy Agreement, and one of which provides the Health Minister with new and wide-ranging powers to limit Medicare coverage.

This is a very disconcerting and questionable provision of power to the Minister. The second reading speech that accompanied this bill said; "A power of this kind is required to allow swift action to be taken to prevent medical practitioners claiming existing Medicare Benefits Schedule items for services which they were never intended to cover ***or which the Government does not wish to fund through Medicare***" [emphasis added].

The Minister's office was initially unable to say why this new power was needed. The AMA said they fear this new power could be used to ban Medicare rebates any time Treasury wanted budget savings, or to limit certain procedures such as hip replacements, for older patients. In addition, there are concerns that the Minister would use this to limit access to previously approved Medicare services (including IVF and abortion), thus having the Minister over-ride the expert decisions of both the Medical Services Advisory Committee (MSAC) and the Medicare Benefits Consultative Committee.

There are occasional instances when doctors use current MBS item numbers to cover new services that have not been approved by MSAC. In these cases, the HIC sends a 'cease and desist' letter, but does not move to recover the Medicare benefits paid. There is one known instance where a doctor had made a legal challenge, insisting that a current Medicare item covered the new (unapproved) spinal surgery he was doing. Giving unfettered power to the Minister to address this one issue does seem to be a sledgehammer approach to a problem that can be fixed by alternative, more precise, means.

A second reason for concern is that PHI funds cover only those items which have a Medicare number and thus Ministerial action could be used to limit the funds' outlays.

There is good reason to believe that the Minister will be vulnerable to pressure for the PHI funds in this regard.

While Labor and the Australian Democrats would not approve the inappropriate utilisation of MBS items for procedures that have not been approved by MSAC, there are already procedures available to Medicare Australia (HIC) to address such misuse. Other, more targeted procedures could be developed if required.

We are pleased that the Minister has finally seen the light and agreed to drop plans to give himself the power to decide unilaterally which treatments get a Medicare rebate. The fact is that after his concerted efforts to limit Medicare payments for IVF treatments, his continual public statements about the need to limit abortions, and his consistent disregard for expert opinions, no one trusted him with these powers.

In agreeing to eliminate this provision, the Minister has now made it possible for Labor and the Australian Democrats to support this Bill and support the recommendation of this report.

Senator Claire Moore
ALP, Queensland

Senator Lyn Allison
AD, Victoria

Senator Helen Polley
ALP, Tasmania

Senator Jan McLucas
ALP, Queensland

APPENDIX 1

Submissions received by the Committee

1 Aleksandrowicz, Kim (VIC)
2 Usher, Ms Maryse (VIC)
3 Tasmanian Medicare Action Group (TAS)
4 Hobart Women's Health Centre (TAS)
5 Calo, Ms Brooke (SA)
6 Vartto, Ms Kaisu (SA)
7 Women's Web Inc (VIC)
8 Women's Health Victoria (VIC)
9 Mann, Ms Patricia (NSW
10 Anaf, Ms Julia (SA)
11 Scott, Ms Jenny (SA)
12 Radical Women (VIC)
13 Fertility Control Clinic (VIC)
14 Students' Association Flinders University (SAFU) Women's Department (SA)
15 Australian Medical Association (AMA) (ACT)
16 Medical Industry Association of Australia (NSW)
17 Australian Reproductive Health Alliance and Marie Stopes International Australia (ACT)
18 Women's Centre for Health Matters Inc (ACT)
19 Australian Women's Health Network (ACT)
20 Australian Consumers' Association (NSW)
21 Gordon, Ms Rosina (NSW)
22 Lynch, Mr Justin (QLD)
23 Name withheld
24 Joseph, Ms Rita (ACT)
25 Department of Health and Ageing (ACT)
26 Bessant, Ms Catherine (QLD)
27 National Association of Practising Psychiatrists (NSW)
28 Hall, Ms Janet (VIC)

29 Australian Divisions of General Practice (ACT)

30 Olle, Ms Liz (VIC)

31 Public Health Association of Australia (ACT)

32 Queensland Government (QLD)

33 South Australian Government (SA)

APPENDIX 2

Public Hearing

A public hearing was held on the Bill on 13 October 2005 in Senate Committee Room 2S1, Parliament House, Canberra.

Committee Members in attendance

Senator Humphries (Chairman)
Senator Moore (Deputy Chair
Senator Adams
Senator Allison
Senator Fielding
Senator McLucas
Senator Polley

Witnesses

Australian Medical Association

Mr John O'Dea, Director, Medical Practice Department

Women's Health Victoria

Ms Marilyn Beaumont, Executive Director

Ms Kerrilie Rice, Policy & Research Officer

Medical Industry Association of Australia

Mr David Ross, Director, Healthcare Access

National Association of Practising Psychiatrists

Dr Gil Anaf, past President

Department of Health and Ageing

Ms Rosemary Huxtable, First Assistant Secretary, Medical and Pharmaceutical Services Division

Ms Samantha Robertson, Acting Assistant Secretary, Medicare Benefits Branch