MINORITY REPORT BY COALITION SENATORS

HEALTH INSURANCE AMENDMENT (COMPLIANCE) BILL 2009

1.1 Coalition Senators support an enhanced and expanded audit process to protect the integrity of the Medicare system and minimise inappropriate or inaccurate Medicare claims. We agree with the need to protect the interests of tax-payers and ensure that public funds be expended appropriately.

1.2 Getting the balance right between the privacy of the patient and ensuring that public funds are appropriated properly should be the paramount consideration in this Inquiry.

1.3 Coalition Senators believe that the Government has not achieved that balance in the *Exposure Draft of the Health Insurance Amendment (compliance) Bill 2009* released on 9 April 2009 by the Department of Health and Ageing and we do not agree with the Majority Report by the Chair of the Community Affairs Committee, Senator Claire Moore.

1.4 In addition, Senators and submitters were forced to rely upon the exposure draft only without the benefit of access to the full legislation and regulations underpinning it.

1.5 The primacy of the principle of doctor/patient confidentially has always been an important part of our health system. Coalition Senators believe that any attempt to weaken this principle should be only as a last resort and subject to strict mandatory protocols. We do not support the provisions contained in the exposure draft legislation that would provide the CEO of Medicare or his/her delegate with the authority to access patient records.

1.6 Coalition Senators agree with evidence provided to the Committee that significant savings could be achieved if some of the expenditure was invested in educational and training measures. This could provide the desired savings and deliver value for the taxpayer without compromising patient record confidentiality.

1.7 We believe that any proposed reforms to compliance auditing of Medicare benefits should include a training or educational component targeted at health

professionals to assist them in achieving greater accuracy in their billing processes, thus reducing inadvertent or unintended claim errors.

PRIVACY

2.1 A considerable number of witnesses and submissions to the Inquiry raised the issue of patient records being reviewed by Medicare Australia investigators during the proposed Medicare Audit process. Patient records contain the personal medical history of an individual and under the current system, they remain strictly confidential between the patient and their medical practitioner. The information contained in these records is often extremely sensitive and the comprehensiveness and accuracy of this information is usually critical to the provision of the highest levels of care. If patients believe that a third person may have access to their confidential medical records without their permission, there is a real risk that they may not provide all the relevant information to their medical practitioner.

2.2 In their submission to the committee the Australasian Society for HIV Medicine (NSW) stated:

> I have worked in general practice for 20 years. In the early days, we kept clinical notes with special codes to hide sensitive information like sexuality from prying eyes. These kinds of special codes impeded the flow of necessary and proper flow of information between professions. Let us not return to those days, just when electronic records are starting to bridge the gap between different sectors of the health workforce.[1]

2.3 The implications of disclosure of private patient information in the area of mental health should also not be underestimated. As mentioned in the Majority Report, the Royal Australian and New Zealand College of Psychiatrists warned the Committee about the “serious consequences for the psychiatrically impaired” from a breach of confidentiality and that any breach could have “extremely traumatising and potentially devastating.”[2]

2.4 In that context, Coalition Senators believe that patient clinical records should only be accessed by a third party as a last resort and under strictly enforced mandatory protocols.

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1 Australasian Society for HIV Medicine (NSW) Submission, p.2.

2.5 The Government claims that there is a need to review patient records to confirm that a patient was eligible for a specific Medicare scheduled item. The Department of Health and Ageing stated that:

> We are not looking at making professional judgements or clinical judgements; this is about administrative requirements for claiming payments.[3]

2.6 Paragraph 1.40 of the Majority Report raises the issue of the qualifications of Medicare audit staff to review patient records. In particular, it notes questions of adequate staff qualifications to interpret clinical records when conducting compliance audits.

2.7 In reviewing patient records to ascertain if a particular Medicare scheduled item was appropriate, Medicare administrative investigators will be required to make professional or clinical judgements that they are unqualified to make about the clinical necessity for that service or procedure.

2.8 Under the Government's proposed, Medicare administrative investigators must have "reasonable concern" that a fee for a medical service exceeds the amount that should have been paid before requesting access to patient records.

2.9 A number of submitters were concerned at the lack of definition of "reasonable concern and the exact type of information considered to substantiate access to the private data of patients. The Medical Indemnity Association of Australia stated that "the exercise of coercive powers in such a vague and unspecified manner is unfair to the recipient of the notice."[4] Similarly, the Australian Medical Association felt that, "we are sacrificing the threshold issue of the privacy of the patient record, " if an administrator's reasonable concern were all that was required.[5]

2.10 Coalition Senators are concerned about the access to the private records of Patients through such means. There are already a number of administrative avenues that can be pursued to ascertain if a particular service or procedure

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2 Royal Australian and New Zealand College of Psychiatrists (VIC) Submission, p.3.

3 Mr David Learmonth, Department of Health and Ageing, *Proof Committee Hansard*, 6 May 2009, p. 88.

4 Medical Indemnity Industry Association of Australia, *Submission 4*, p. 5.

5 Dr Rosanna Capolingua, Australian Medical Association, *Proof Committee Hansard*, 6 May 2009, p. 71.

was claimed and performed without the need to access personal clinical records.

These include:

- Provider's certification or other legal declaration that the patient was eligible for the service rendered.
- Tests - Medicare Australia could ask for evidence that the test was done;
- Referrals - Medicare Australia could ask to see the referral;
- Time spent with a patient, or the service performed at a particular time – Medicare Australia could ask for evidence that those time requirements had been met;[6]
- Pre-existing condition – Medicare Australia could ask for evidence that the pre-existing condition existed.[7]

PROFESSIONAL SERVICES REVIEW BOARD

3.1 Where serious concerns are raised concerning a medical provider's practices, there are already proven avenues that can be pursued to investigate the conduct. In the event that the CEO of Medicare is not satisfied with the evidence provided by a medical professional under investigation and believes that reviewing a patient's records may be required then this matter should be referred to the Professional Services Review Board (PSR) for investigation.

3.2 The PSR is comprised of relevant medical professionals appointed by the Minister for Health and Ageing who are qualified to interpret clinical records and make recommendations about the conduct of medical practitioners to the CEO of Medicare Australia.

3.3 Coalition Senators believe that existing processes already provide for sufficient access to confidential patient records by third parties in limited circumstances. Any further expansion of access to these records in order to prosecute serious fraudulent Medicare claiming activity must be subject to strict mandatory protocols to protect the privacy of the individual.

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6 *Exposure Draft of the Health Insurance Amendment (Compliance) Bill 2009 Explanatory Material*

7 *Exposure Draft of the Health Insurance Amendment (Compliance) Bill 2009 Explanatory Material*

INCORRECT BILLING

4.1 The government has increased the number of annual Medicare Audits from 500 to 2500. Coalition Senators support this increase as it recognises the increase in Medicare provider numbers issued to health professionals and the associated increase in Medicare claims.

4.2 Evidence was provided to the committee that errors and incorrect Medicare claims were responsible for a significant proportion of inappropriate claims rather than deliberate fraud. The committee heard suggestions from a number of witnesses as to how the savings desired by government could be realised without invasive audits or compromising patient records.

4.3 Dr Flegg from the Royal Australian College of General Practitioners stated:

> I think confusion by the schedule is another important point to make. The MBS is complex and amazingly confusing. Medicare itself gives conflicting advice at times about how to bill properly. Even excellent doctors with really good intentions can make mistakes. The college thinks that the MBS needs revision with a view to simplification and that that money would be better spent on an activity such as that, plus education. We believe the end result would be the same.[8]

4.4 Dr Flegg asserted that if the money proposed by the government on the audit process were redirected to initiatives such as education, training and simplification of the MBS then significant savings to the tax-payer could be realised.

> We feel that incorrect claiming or mistakes in claiming could be better addressed by investing in the education of general practitioners specifically in the area of billing practices, particularly of new GPs who may be confused by the schedule.[9]

4.5 Dr Capolingua, former President of the AMA further argued in her evidence to the committee:

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[8] Dr Flegg RACGP, Proof Committee Hansard 6 May 2009, p.CA3.

[9] Dr Flegg RACGP, Proof Committee Hansard 6 May 2009, p.CA3.

> All this, when government already openly admits that the biggest hurdle to compliance is red tape, and helping doctors to understand and comply with an increasingly complex system will deliver far greater, long-term benefits than sacrificing the privacy of all Australians to catch a handful of doctors and a few honest mistakes.[10]

4.6 The Government has indicated that the Increased Medicare Compliance Audit initiative will provide savings of $147.2 million over four years and will cost $76.9 million to administer, leading to net savings of $70.3 million over four years.

4.7 Given the significant administrative costs of the measure, Coalition Senators believe that the Government should redirect some of this expenditure into education and training measures to achieve similar savings without compromising patient privacy.

CONCLUSION

5.1 Coalition senators support enhanced Medicare Audit measures designed to protect the integrity of the Medicare claims scheme and to ensure the appropriate expenditure of tax-payer funds.

5.2 Coalition Senators do not believe that access to patient records should be extended to the CEO of Medicare or his/her delegate. The confidentiality of patient records must be preserved by limiting access to these records to necessary medical professionals, or in very limited cases and under strict protocols, to the Professional Services Review Board.

5.3 We acknowledge the concerns raised by a number of witnesses during the committee process that the complexity of the Medicare schedule may lead to incorrect claims lodged by Medical professionals and that a number of incorrect claims may be the result of error caused by confusion with the system rather that deliberate fraud.

5.4 A review of the Medicare Schedule as well as an educational program for Medicare Professionals must be conducted to reduce inadvertent or honest mistakes being made when lodging Medicare claims.

5.5 The Office of the Privacy Commissioner should be consulted during the development of regulations, guidelines or protocols that will protect patient record confidentiality during any Medicare audit

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[10] Dr Capolingua AMA. Proof Committee Hansard 6 May 2009, p. CA66.

investigation that may be referred to the Professional Services Review Board.

RECOMMENDATIONS

Recommendation 1

The Government conduct a review of the Medicare Benefits Schedule with the view to rationalising or simplifying individual schedule items.

Recommendation 2

The Government develop a training/information program in consultation with relevant professional associations to improve the accuracy of Medicare billing practices among health care professionals.

Recommendation 3

If the Medicare CEO remains unsatisfied with the responses of the medical provider or has further questions that the CEO believes may only be resolved through reviewing a patient's record, then the matter should be referred to the Professional Services Review Board to be reviewed by a committee of the practitioner's peers. A report prepared by the Professional Services Review Board could then be submitted to the Medicare CEO for consideration.

Recommendation 4

The Office of the Privacy Commissioner should be consulted to develop protocols and guidelines for the protection of patient history record confidentiality during any Medicare compliance audit activity.

Senator Sue Boyce
LP, Senator for Queensland

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