

Our ref: 2007-111705

29 May 2009

Mr Elton Humphery  
Committee Secretary  
Senate Standing Committee on Community Affairs  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600



Dear Mr Humphery

### **Inquiry into Compliance Audits on Medicare Benefits**

I am writing with regard to the above inquiry being conducted by the Standing Committee.

I note that the timeframe for submissions was extended to 29 May 2009 with respect to the Privacy Impact Statement, and that my colleague the Privacy Commissioner has made submissions on that aspect of the *Exposure Draft of the Health Insurance Amendment (Compliance) Bill 2009*.

I do not propose to address the privacy issue; however, recent work undertaken by my office in the course of an investigation, has prompted me to provide comment on other aspects of the proposed Bill.

Through the course of investigating a complaint to my office, it has come to my attention that there are circumstances in which there may be genuine confusion or disputes as to the meaning and coverage of items in the Medicare Benefits Schedule (MBS). Such confusion may arise out of, for example, the listing description for new procedures and technologies which appear to a reasonable practitioner to fall within the wording of a pre-existing MBS item, but which, under closer examination, policy makers did not intend that item to cover.

While I am aware of recent changes to clarify the MBS in a timely manner, such as Administrative Position Statements, not all practitioners will doubt their own interpretation of an item in the first place or be in a position to access these Statements at all times. Importantly, it is the MBS itself that will remain the primary source of information for practitioners. However, the dynamic nature of medical science, the diversity of practitioners and the variety of circumstances in which they practice, together with the pace of innovation, inevitably mean that the MBS will never be entirely up to date or unambiguous to all users in all circumstances. Changes in practice and terminology will always result in a certain level of uncertainty over what is or is not covered by a particular MBS item and consequently any compliance process should accommodate the possibilities of genuine confusion, dispute or honest mistake.

As I understand it, the proposed Bill gives rise to debts in respect of any amount not properly substantiated by documentation sought by way of audit. At the same time, the proposed Bill establishes an automatic penalty regime with reductions in the amount of the penalty that vary depending on when a practitioner advises Medicare that an amount has been incorrectly paid. The difficulty this gives rise to is that there is no room for the resolution of genuine disputes about the meaning of items. Nor is there any incentive for the Department to warn practitioners about genuine, but incorrect, understandings of items or to clarify those items in a timely manner.

Consequently, I would recommend consideration of the inclusion of an initial written warning to practitioners before any penalty can be imposed and also of a mechanism by which merits review can be sought of the meaning of items and whether or not a claim is properly substantiated. Moreover, there should be no disincentive to seeking review. As presently drafted the amount of penalty is linked to taking steps at a time that would preclude seeking review.

It would also be appropriate for consideration to be given to establishing a formal mechanism whereby practitioners can draw the attention of the Department to confusion in the MBS item descriptors, and have these formally addressed in a systemic manner.

I anticipate that the report of my investigation will be available publicly at some point over the next six weeks. In the meantime, if you or the Committee would like to discuss any of the matters I have raised I can be contacted on 6276 0149, or you may wish to contact the senior executive in this office responsible for the investigation discussed above, Mr Adam Stankevicius on 6276 3754.

Yours sincerely



Prof. John McMillan  
Commonwealth Ombudsman.