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Professional Services Review – section 92 agreements

AMA submission to the Review of section 92 of the *Health Insurance Act 1973*

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Introduction

The AMA welcomes the review of the procedural fairness of the section 92 process, and indeed called for it before the commencement of the Covid-19 pandemic.

The AMA supports the current legislative framework for the Professional Services

Review (PSR) scheme and peer review of inappropriate practice as defined in s.82 of the

Health Insurance Act 1973 (the Act). The AMA also supports in principle the ability, where appropriate, for persons under review (PURs) to enter into a negotiated agreement under section 92 of the Act (S92 agreement). However, the AMA is concerned that this process lacks transparency and is not procedurally fair and just.

This submission outlines key issues we have identified through feedback from members and finishes with recommendations for Emeritus Professor Robin Creyke AO.

PSR process and options for PURs

The AMA has been informed by doctors who have entered into an S92 agreement that they felt coerced. This is the core of the AMA's concerns. All doctors who enter into an S92 agreement must do this voluntarily, and the acknowledgement of inappropriate billing practices should be genuine. To ensure this occurs, the PSR must provide clarity in the process of the entire review, and clearly explain all options to the PUR at each step of the way.

Correspondence from AMA members regarding the S92 agreement process across many years demonstrates that there is a lack of adequate and accessible information available to PURs regarding the multiple steps of the process and their rights along each of the checkpoints.

Whilst the Guide to the PSR process provides useful information for PURs, more detailed information is required to improve transparency and understanding of the process and the rights of PURs (including the S92 agreement).

For example, the AMA understands that the Practitioner Review Program (PRP) and the PSR processes offer practitioners several opportunities to receive relevant information to their case, and to respond to the Department of Health's or the PSR's concerns, and that all relevant information is carefully considered prior to progressing a case to the next level of scrutiny.

However, there does not appear to be any publicly available documentation that outlines what the PUR could expect with respect to the specific timing and opportunities to respond. The lack of relevant resources makes the process opaque, confusing, and stressful for practitioners. Practitioners also want to know who is reviewing their records for the purposes of the review.

Furthermore, before they sign an S92 agreement practitioners should be made aware of their rights to challenge decisions by PSR Committees and Determining Authorities in the Federal Court. Administrative law is complex and it is not obvious to practitioners that they have avenues for review outside the Act. Without this information, some PURs feel that they are being given a 'choice' between signing a S92 agreement and embarking on a process where PURs have a historically low rate of success and no rights of appeal.

While PURs will usually be represented by MDOs, it is important to appreciate that MDOs do not provide cover for amounts repayable to MBS. This gives MDOs have a strong incentive to encourage PURs to 'settle' and thereby reduce ongoing administrative and legal costs to the MDO of defending the PUR. It also means that MDOs do not have an incentive to:

- Challenge requests for documents and other information;
- Challenge interpretations of MBS items by the Director or a Committee;
- Negotiate for the disputed item (e.g., an after-hours MBS item or specialist MBS item) to be replaced with a lower cost item; or
- Alert PURs to their ability to "appeal" decisions.

The AMA is not suggesting that the activities of MDOs are inappropriate or that any changes to the law need to be made to address these points. It is simply noting that there is an information gap. By filling this gap with adequate and available information, the Department and PSR can reduce the instances of doctors reporting that they did not understand the process or felt compelled to sign an S92 agreement.

Improvements to PSR operational protocols

In October 2010, the AMA wrote to the Department of Health **(Attachment A)** and suggested reforms to the PSR process to improve transparency and procedural fairness. Whilst there has been some improvements in the transparency of PSR processes over the last decade, the AMA believes that many of the suggestions in Attachment A could be actively reviewed and considered by the PSR in today's context.

Some key suggestions from 2010 that warrant a review and consideration include:

- Development and publication of PSR operational protocols – so that PURs know what to expect and can check their experience against the protocols;
- Publication of other documents governing the processes followed by the Director, Committees and the Determining Authority, e.g. the Committee Handbook – again for transparency;
- A framework setting out the scope of investigations, a process to ensure PSR committee panels are appropriate, and greater transparency in relation to requests for advice from experts, including the advice received;
- A proforma for statement of reasons for decisions and decisions at all stages of the process – to ensure full reasons are given about the evidence the director/committee considered, the conclusions they reached and the reasons for their decisions; and

- The reasons for Medicare Australia's request to the Director to review the PUR's services should be made known to the PUR. If the Director's request for documents goes beyond the scope of the reasons, the Director should have to give some rationale for that expansion for the documents they request. The request must be demonstrably relevant and proportionate. Despite wide ranging powers granted to the Director and Committees in legislation, those powers should not be used to initiate a fishing expedition. This requirement should also apply to Committees if they decide to extend the scope of their investigation beyond the scope of the referral from the Director.

MBS interpretations and scope of practice

Some AMA members have been frustrated by the PSR's interpretations regarding MBS Item use. The AMA has heard that when a practitioner's use of certain Items has been noted as concerning by the PSR, they have not been able to receive clear information on which Item/s they should have been using instead. This frustrates the practitioner while undermining the credibility of the PSR.

AMA members have also expressed concern about what they see as an inappropriate approach being taken by the PSR Director to determining scopes of practice. Practitioners interpret this as impacting the review process in so far as practitioners believe that the PSR enters the process with predetermined outcomes.

For example, regarding statements made in the April 2019 PSR newsletter, AMA members were of the view that accreditation at a public hospital is a totally inappropriate guide to competence and training due to inter specialty competition; rural issues, funding of medical appointments; theatre time; resource allocation; and federal/state cost shifting.

> "A number of general practitioners and OMPs have begun billing for extensive flap repairs, skin grafting and removal of underlying bone or cartilage and surgical management of invasive melanoma.
>
> In considering whether it is appropriate practice, Committees might consider whether the training and qualifications of a practitioner under review are equivalent to those that would apply to practitioners who perform equivalent procedures in a public hospital setting.
>
> If the answer is that the practitioner under review is unlikely to receive accreditation to perform these procedures in public hospitals on public patients, then consideration should be given as to whether the performance of such procedures represents inappropriate practice because a practitioner is practising outside the general body of the professions understanding of appropriate scope of practice."

Another example was for a PSR case related to potentially inappropriate claiming of after-hours MBS items. Some medical practitioners have expressed concern that the PSR director is of the view that an urgent case that could be appropriately seen after hours is a patient with severe asthma attack that needs administration of oxygen and nebulised Salbutamol. The GP who was the PUR in this case believed that this definition is fitting of a patient requiring emergency department care and not urgent care by a GP. Furthermore, the GP in question advised that it is not practical for a home visiting GP to carry nebuliser equipment and oxygen capsule.

Other examples include administration of IV fluid and intramuscular antibiotics in home setting. Some believe that the PSR's views on scopes of practice are irresponsible and indicate unfair and a biased process that victimises particular GP specialists (e.g. rural and after-hours GPs).

The Director of the PSR is not the final arbiter on interpreting the MBS, particularly when the Items in question are in a field not the Director's expertise.

Adversarial style of investigation

AMA members have complained about the adversarial and inquisition style of investigation of the PSR Director which causes undue stress and pressure on the PUR. These investigations have taken a significant toll on the health of PURs which can and has contributed to practitioners accepting an S92 agreement despite not believing that they had in fact acted inappropriately regarding their MBS billing practices.

Recommendations

The AMA makes the following recommendations to improve the procedural fairness of the process for a PUR entering an S92 agreement:

1. All options for a PUR, including appeal options available to them under administrative law, must be clearly and immediately provided upon notification that they have been referred to the PSR.
2. All processes leading up to and during the review must be clear and transparent. This includes the processes undertaken ahead of the referral to the PSR, the initial review, findings and qualifications of the peer reviewer, and the scope and process of a PSR Committee review should the PUR opt for that instead of an S92.
3. The Director refrain from commentary on personal interpretation of MBS items and scope of practice outside of the review process. Within the process, these interpretations must be made clearly and open to appeal.

The AMA expects that the PSR and the Department of Health will minimise the problems raised in this submission. As such, we recommend that the reviewer test the process by engaging with individuals who regret entering an S92 agreement and maintain that their billing practices were not inappropriate.

The AMA looks forward to further engagement with the reviewer to discuss the above or any other issues related to the review.

10 December 2021

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Attachment A

10/206

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Mr Richard Bartlett
A/g First Assistant Secretary
Medical Benefits Division
Department of Health and Ageing
GPO Box 9848,
Canberra ACT 2601

Dear Mr Bartlett,

I refer to Mr Learmonth's letter to Dr Pesce dated 11 October 2010 requesting three nominees to represent the Australian Medical Association on the PSR Advisory Committee (PSRAC).

The AMA's nominees are: Dr Steven Hambleton, Dr Brian Morton and Dr Iain Dunlop, who is a Canberra ophthalmologist.

As you are aware, the AMA has had serious concerns about the operation of the PSR Scheme for some time. We welcome reconvening the PSRAC as an important step towards improving the operation of the PSR agency and improving the transparency of the process. We believe this will go a long way to restoring the confidence of the profession in PSR processes.

We think the PSRAC should consider:

- The lack of transparency in the PSR system and resulting perceived failures to accord the person under review (PUR) Natural Justice. The Director should be more accountable in this regard. Specifically, the operational protocols of the PSR should be made public (and written if they do not yet exist), the PUR should be given information about the process, and the Director should be required to give reasons to the PUR for all the Director's decisions.

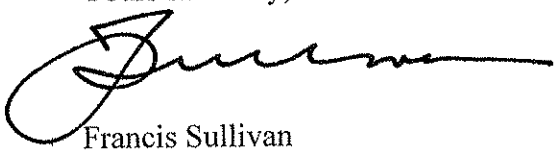
- The impact of Director's public statements on health care delivery. The Director's statements are based on a very small sample of practice and yet have had potentially serious effects on the provision of healthcare as doctors seek to avoid PSR scrutiny. The Director's public comments should be restricted to the matters that have been investigated by PSR committees, which are publicly reported in detail in the PSR Report to the Professions.

- The role of the Director to educate the profession in clinical practice. It is not helpful or appropriate for the Director to extrapolate from the small fraction of cases he sees to the entire profession and make public comments under the guide of 'education'. The educational function should be limited to information about Medicare billing. And this

should be located in a much earlier stage of Medicare compliance activity, and be targeted, based on profession wide trends.

A detailed summary of the AMA's suggested reforms to the PSR process, addressing each of these areas of concern is attached to this letter.

Yours sincerely,



Francis Sullivan
Secretary General
15 October 2010

fs:kk

AMA Suggested reforms to the PSR Process

The PSR process currently suffers from a perceived failure to accord Natural Justice to the Person Under Review (PUR). More specifically PUR's have complained to AMA Secretariat that:

- the Director asks for the production of large volumes of clinical records without telling the PUR what issues he is investigating;
- PURs are not given a clear explanation of the review process and their rights such as legal representation at the beginning of an investigation;
- PSR Committees are comprised of doctors who have not practiced for some time or who practice in a different field to the PUR;
- the statements of reasons given in decisions made by the Director or Committee do not appear to consider evidence the PUR has provided during the review, or explain how the evidence was considered, or why it was dismissed; and
- the statements of reasons given in decisions do not actually explain the decision of the Director or Committee.

Our overarching concern is that there is a lack of transparency that PSR investigations have followed due process. The operational protocols used by the Director and the Committees when reviewing the PUR are not publicly available. If those protocols were available the PUR would be able to determine more easily what to expect, and whether their experience followed correct process.

To address these concerns the AMA would suggest:

1. The pro-forma letters and forms that are sent to PURs should be made available to the AMA for review.

2. The reasons for Medicare Australia's request to the Director to review the PUR's services should be made known to the PUR. If the Director's request for documents goes beyond the scope of those reasons, the Director should have to give some

rationale for that expansion and for the documents he or she requests. The request must be **demonstrably relevant and proportionate**. Despite wide ranging powers granted to the Director and Committees in legislation, those powers should not be used to initiate a fishing expedition. This requirement should also apply to Committees if they decide to extend the scope of their investigation beyond the scope of the referral from the Director.

3. There is no guidance in the legislation regarding the operational or administrative protocols the Director uses when investigating a PUR and subsequently when negotiating a Negotiated Agreement. As such, there is a lack of transparency around the process the Director has followed during his investigation. Consequently, questions arise over whether the PUR was afforded Natural Justice. The AMA suggests that:

   - there should be such protocols that are appropriately specific, clearly understood and transparent;
   - the protocols are made publicly available; and
   - a copy is given to a PUR at the start of any investigation.

   Specifically, the AMA would envisage that any such protocols would include provision for negotiations between the Director and the PUR to be observed by an independent third party, and for the PUR to be allowed to have representation during the negotiation.

4. Other documents governing the processes followed by the Director, Committees and the Determining Authority, e.g. the Committee Handbook, should be made publicly available.

5. AMA members have claimed that the Director passes judgment in areas of practice that fall outside his area of expertise. We suggest that s.90 of the Act be changed from allowing the Director to consult an expert in making his review, to requiring him to consult an expert Panel member if the PUR practices in a field that is not the field of the Director's specialization. The Director should also provide the PUR with

information about that consultation, including the questions asked by the Director and the responses given.

Public Statements of the Director

The PSRAC should objectively investigate the impact the Director's public statements have on health care delivery. The AMA recommends that the Director confine his statements on these matters specifically and explicitly to the isolated cases investigated by PSR committees, solely to provide examples of inappropriate practice to practitioners.

In his annual *Report to the Professions*, and associated media appearances the Director has taken it upon himself to make statements about inappropriate practice by medical professionals based on the reviews that were the subject of Negotiated Agreements. For example, in the 08-09 Report he stated, 'I have been alarmed at the number of [CT] scans ordered without clinical justification', although the Report itself indicates that only 2 doctors were found to have ordered CT scans inappropriately. Given the extremely small proportion of the Australian medical profession that comes under the Director's review, it is irresponsible and unsupportable for him to attempt to identify nationwide trends in medical practice.

This type of public statement is damaging to the profession, has potentially serious consequences for patient care, has limited educative value, and violates the confidential nature of negotiated agreements.

1. **Serious consequences**: After Dr Webber chose to highlight C and D consultations in 2006, a reduction in C and D's occurred despite the Health Minister saying at the time that doctors should spend more time with patients. We expect that the Director's recent comments about inappropriate ordering of CT Scans will have a similar effect.

2. **Educating the profession**: The Director has argued in the past that his intention in making these observations in a very public way through the media is to educate the profession. The AMA acknowledges that education is an important goal of the professional review process, but there is no benefit in gleaning that education from the tail end of a process that starts with a large number of doctors being contacted by Medicare Australia and ends with just over 100 cases at the PSR. Furthermore, is

publicity through the general media the most appropriate way to educate the profession? The NPS, TGA, Medicare Australia and other regulatory bodies use targeted education, communicated directly to the profession only.

The PSRAC should reconsider the education strategy of the entire review process.

There is significantly more benefit to be gained in identifying potential problem areas from Medicare Australia's much broader view of practice, and in tailoring preventative education strategies. eg. Informing the profession of 'best practice' in a particular area and warning that there will be particular scrutiny of that practice over the next 12 months. These target areas should be determined in consultation with doctors, medical academics and the AMA. Developing professional education strategy in this way will also prevent the damage to health care caused by the current strategy employed by the Director.

3. Nature of Negotiated Agreements: It is a very serious concern that the Director has made public statements about practices that were the subject of Negotiated Agreements. This goes against the spirit of a Negotiated Agreement that is intended to be kept confidential between the Director and the PUR. Consequently, information about Negotiated Agreements only appears in a matrix in the Report to the Professions. We suggest that the Director should confine any public comments to matters which were the subject of Committee Reviews, the full nature of which are published in the *Report to the Professions*.