



AUSTRALIAN MEDICAL
ASSOCIATION

ABN 37 008 426 793

T | 61 2 6270 5400

F | 61 2 6270 5499

E | info@ama.com.au

W | www.ama.com.au

42 Macquarie St Barton ACT 2600

PO Box 6090 Kingston ACT 2604

AMA response to the Report on review of Section 92 of the Health Insurance Act 1973

The AMA welcomes the report on review of Section 92 of the *Health Insurance Act 1973*. The review was conducted in response to concerns raised by the AMA in 2019 about the procedural fairness of the Section 92 process. The AMA appreciates the response of the Department of Health and Aged Care (the Department) and the Professional Services Review (PSR) to these concerns in commissioning the review.

The AMA raised the concerns with the S92 process in response to feedback from members and general concerns among medical practitioners about the PSR, not exclusively S92 agreements. As noted in the review, the AMA supports the PSR scheme as an important institution for protecting patients, the integrity of publicly funded healthcare, and as a body comprised of peers of the person under review (PUR). The AMA has raised concerns with the PSR throughout its 27 years in response to concerns about treatment of members and out of concern that the actions – real or perceived – of the PSR are undermining faith in the scheme amongst the profession.

While the AMA has a legislated role in the appointments of PSR Director and to committees, we are not involved at any stage of the review process and have no oversight of the content and conduct of reviews. The intention of sharing the feedback was to ensure that medical practitioners (and by extension other health professionals) had received a fair hearing under the PSR and improve transparency of PSR activity and information available to PURs and all doctors to limit misconceptions about the PSR amongst the profession.

General feedback

Our perception is that the review process was conducted thoroughly and appropriately. While the review concluded that the process for a PUR to accept a S92 agreement is fair, there were significant areas for improvement identified by the review. The AMA accepts most of the recommendations and looks forward to working with the PSR and Department to implement these changes.

In particular, many of the recommendations are to increase transparency at all stages of the process and of outcomes. The AMA strongly supports these recommendations and also recommends publication of Tables 1, 2, 4 and 5.

The AMA accepts the reviewer's conclusion that no actions are required to limit PURs feeling coerced into signing a S92 beyond the 14 recommendations. This does not mean the AMA believes there was no coercion, coercion itself is subjective.

However, it is important to note that there are clear benefits to the S92 process when compared with S93 (referral to Committee) as noted by the reviewer. Many of the issues that the AMA raised on behalf of members who felt coerced also resulted from the lack of public information available and understanding all options available. As the recommendations should alleviate some these issues, we are satisfied.

The AMA accepts the reviewer's conclusion that the PSR process is inherently inquisitorial by design and that this is not a problem for the functioning of the review or S92 agreement. However, while it may be appropriate for the process to be inquisitorial it does not mean the process must be adversarial. The PSR should view this as an opportunity to reflect on how to investigate without distressing the PUR. This would limit the lingering distrust many doctors have after the process is concluded.

The reviewer has rightly acknowledged that the PSR process is highly stressful and, while Doctors' Health Services is listed in the report, we would like to see the PSR include clear links to the service and for relevant services for other health professionals.

While the AMA supports most recommendations as written, some require further examination or consultation. The AMA's responses to each recommendation, and the two observations, are detailed below.

Recommendation 1: *Legislation be re-introduced into the Parliament along the lines of the Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021 to ensure the reforms proposed for section 92 be implemented. These include that the PSR Director has the full range of options relating to sanctions that may be imposed by the Determining Authority.*

This has already occurred. The *Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2022* was introduced into the Senate in August. The AMA does not oppose the Bill.

Recommendation 2: *The Professional Services Review (PSR) should publish in the Guide and on the website information in broad terms as to the reasons for, and the processes by which, calculations of repayment amounts are made.*

The AMA strongly supports this recommendation which aligns with the AMA's second recommendation to improve transparency in [our submission to the review](#). This work should commence immediately.

Recommendation 3: *The PSR should update the hard copy of the Guide and its website to include indicative information about the duration of the review processes. The timeline should run from the time of the CEM's 'Request to Review' to the PSR Director till [sic] the coming into force of the section 92 agreement following ratification by the Determining Authority.*

The AMA supports this recommendation, again to improve transparency. The AMA would like to see Doctors' Health Services information provided along with this as it is likely this will be a highly stressful time in the process.

Recommendation 4: *The Department, in consultation with the peak bodies for specialists and allied health professionals, take steps to finalise the legislative criteria for a 'prescribed pattern of services' for specialists and allied health professionals in light of the recommendation made in the 2007 Review.*

The AMA has no comment on the prescribed pattern of service for allied health professionals, however determining patterns for non-GP specialists will be complex and require multiple, detailed criteria across the specialties. The AMA recommends that the Department regularly review these patterns, along with the 80/20 rule for GPs, to ensure they reflect contemporary practise. The AMA also continues to recommend that the Department better articulate the 30/20 rule for telehealth by telephone. Ensuring that there are clear justifications for all prescribed patterns is essential for the PSR earning the trust of the professions.

Recommendation 5:

- A. *The Act be amended to permit delegation by the PSR Director of functions other than the decision-making function.*
- B. *Assuming the recommendation is accepted, the Act be amended to provide for the qualifications of the delegate and for consultation with appropriate bodies about the appointment.*

The AMA is supportive of the intention of these recommendations, however further consultation is required to ensure that these amendments genuinely improve the process for a PUR.

Recommendation 6: *The Act be amended to permit the PSR Director to release information to Ahpra and to State and Territory regulatory bodies following a section 92 process but only if it is in the public interest to do so.*

The AMA does not support this recommendation. As noted in paragraph 1.6, cases are already referred to Ahpra where patient safety is involved. Practitioners are also required by section 109 of the National Law to notify Ahpra if their ability to bill Medicare is withdrawn or restricted as the result of a S92 agreement. The AMA strongly opposed a proposal to amend the National Law to require notification of all S92 agreements given that:

- confidentiality is a key driver for practitioners to sign S92 agreements; and
- there are significant advantages to both practitioners and taxpayers of resolving matters under S92.

We note also that the *Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2022* expands the circumstances where a S92 agreement can be published. As noted in the Explanatory Memorandum:

The Bill expands the circumstances in which the possibility of publication of certain personal information may occur. The information will include the person's name, address and profession, as well as the nature of the acknowledged inappropriate practice and specified actions agreed with the Director. The publication may occur in circumstances where a [PUR] has entered into [a S92 agreement], but has not taken action specified in the agreement that is necessary to give effect to the agreement, or action has been taken in a court for the purposes of enforcing the agreement. The CEM may notify the Director if any of these circumstances arise...

[This] provides an incentive for persons under review to meet the actions specified in their agreement. To date, agreements have been confidential but, unfortunately, some persons have not complied with the terms of their agreement. The publication measure signals that, where a person enters into [a S92 agreement], there is an expectation that the agreement will be honoured and failure to comply may result in reputational consequences. The Bill therefore protects the integrity of the PSR agreement process.

For example, publication could occur where the PUR has not repaid the agreed amount. The Bill includes measures to provide procedural fairness to PURs. In particular:

[The] CEM must provide the [PUR] with written notice prior to notifying the Director. The notice must set out the reasons why the CEM is of the opinion that the person under review has not complied with the agreement and must give the person an opportunity to make submissions about why the CEM should not notify the Director.

Recommendation 7: *The Act be amended to provide in section 84 that the AMA consult allied health practitioners and organisations prior to the appointment of the Director.*

The AMA understands that a having a medical practitioner as Director of the PSR can be a challenge for non-medical health practitioners. We appreciate the reviewer's acknowledgement that the Director must remain a medical practitioner. The AMA is always open to discussing the PSR with other bodies that represent health professionals under the PSR, however we are not clear on how this consultation will alleviate the concerns given the Director will be a doctor.

The process that the Department and the PSR undertake to fill roles on panels and the Director role is comprehensive and ensures only the right candidates are chosen. The AMA would like to understand at what stage this consultation would occur and what the intended outcome is.

Many of the other recommendations in the report will address many of the outstanding issues around process and transparency, such as Recommendation 8. Should the issues experienced by non-medical PURs persist, this can be returned to in the future.

Recommendation 8:

- A. *The Department provide to the Minister a proposal for 'guidelines setting out the terms and conditions upon which consultants may be engaged under section 106ZP(4) of the Act'. The guidelines should reflect the current practice which is that the person appointed not have a conflict of interest and to the extent possible have qualifications and experience appropriate for the case on which advice is sought.*
- B. *The Guide and other material on the PSR website be updated to contain information at a broad level as to:*
 - i. *statutory criteria for, and steps taken, to identify an appropriate consultant or professional organisation appointed under section 90 to advise the PSR*

Director, taking into account the need to ensure the independence and objectivity of the person; and

- ii. that a consultant appointed under section 90 is a professional whose qualifications and experience should, as closely as possible, match the experience and qualifications of the practitioner under review but is not necessarily a direct 'peer' of the practitioner member.*

The AMA supports this recommendation.

Recommendation 9: *The PSR include in the Guide and other material on the PSR website information on the Director's practice of summarising in the section 89C report relevant elements of the consultant's advice that the Director accepts, the qualifications and, as appropriate, experience of the consultant, and the absence of conflicts of interest.*

The AMA supports this recommendation.

Recommendation 10:

The PSR should:

- A. update the Guide to expand the information relating to the section 92 agreement process taking into account the suggestions in this review.*
- B. include a flow-chart of the process under section 92, updated as necessary.*

The AMA supports this recommendation. The chart on page 32 is a strong starting point. This chart could be improved by adding click-through links to each stage for PURs and other involved parties to understand the various steps.

Recommendation 11: *The PSR should:*

- A. regularly review its website design to ensure the information published is consistent with the Australian Government Digital Service Standards; and*
- B. ensure that its content on section 92 processes is enhanced by webinars and podcasts supplemented by other appropriate hard copy and online sources.*

The AMA supports this recommendation.

Recommendation 12: *To combat misperceptions about the scheme, professional associations, the AMA, the PSR, and the Department, should regularly update their websites to include statistics about compliance outcomes of reviews under section 92.*

The AMA welcomes the sharing of more data related to the PSR and S92 process. This was a key recommendation in our initial submission. While the AMA is eager to share this information with members, the AMA is not responsible for maintaining the reputation of the scheme. The AMA expects that improved transparency will achieve this, however it is essential that the AMA remain independent of the PSR and is able to provide honest feedback about the process. This report is itself the outcome of this feedback, and we feel strongly that this is a value add to the PSR and the profession more broadly.

Recommendation 13: *The PSR include in the Guide and on other material on the website indicative examples of criteria used by:*

- A. *the Director:*
 - i. *when not accepting a request for a section 92 agreement; and*
 - ii. *the kinds of clinical practices or conduct when deciding to negotiate an agreement.*
- B. *the Determining Authority:*
 - i. *when not ratifying an agreement;*
 - ii. *for ratifying an agreement.*

The AMA supports this recommendation.

Recommendation 14: *The Department should:*

- A. *expand the information on the Practitioner Review Program on its website;*
- B. *undertake an examination of its letters to practitioners in consultation with the AMA or appropriate College to ensure they are appropriate for the range of responses and recipients.*

The AMA supports this recommendation. While this review primarily focuses on the S92 process, increasing the amount of information about the entire PSR process would improve the perception of the PSR among the profession. This is also work which should commence immediately.

Ensuring the AMA and/or other relevant bodies review letters prior to their circulation is prudent and is another recommendation that should be immediately actioned. The AMA already provides this type of advice and feedback to other compliance branches within the Department to limit misinterpretations. This also ensures the AMA is aware of the communications and is prepared should members raise concerns.

Observation 1: *The Department should:*

- A. *Continue regularly to update MBS online and records of responses to questions in AskMBS under the supervisions of a Senior Medical adviser, assisted by Medical Advisors.*
- B. *Ensure that MBS online and AskMBS reflect any changes needed following PSR Committee findings or Federal Court decisions which overrule or alter information in MBS online or records of responses in AskMBS.*
- C. *Display prominently on its website newsletter, advisories and targeted newsletters featuring changes to key items in the MBS.*
- D. *Continue regularly to conduct seminars on items or discussions on changes to MBS or items which cause difficulties of interpretation for practitioners, after consultation with the PSR, the AMA and other peak health bodies about which items to feature.*

The AMA appreciates this observation and agrees with the feedback and thinking that led to it. The position outlined in paragraph 4.11 is an ongoing frustration for all medical practitioners. While it is beyond the remit of this review – and beyond the ability of the Department – improving AskMBS and removing ambiguity within MBS descriptors would significantly limit regular practitioners' concerns with the PSR. Many doctors fear that a simple misinterpretation could lead them to the PSR. While this is not likely to be the case and many recommendations within

this report should alleviate these concerns, these inconsistencies are an existing problem that should be addressed.

Observation 2:

- A. *Training on billing and on the compliance program in Part VAA in the Act should be undertaken by the peak professional medical and allied health organisations and be required at least every three years as a matter of continuing professional development for practitioners with provider numbers or who intend to obtain one.*
- B. *Such training should include the development of templates for courses which could be populated for training purposes by smaller health organisations.*
- C. *The Department should coordinate discussions with the AMA, peak health and medical organisations, the PSR [and the AMC] on what training is required on the Part*
- D. *Accreditation of training courses should be undertaken by the Department.*

The complexity of the MBS as a whole and individual items in particular can make billing challenging. As it is the doctor's responsibility to understand billing and ensure that they are meeting the requirements of each MBS item they bill, it is important that they are able to access timely and accurate advice. It is imperative that resources are directed to:

- Improving MBS Online
- Improving AskMBS
- Improving the readability of item descriptors
- removing ambiguity from item descriptors.

The AMA would agree with Paragraph C above in relation to supporting the Department to coordinate discussions with the AMA, peak health and medical organisations, including Practice Managers, the PSR [and the AMC] on what additional training is required on the Part VAA of the Act, including how often and who it would be delivered by.

Final Comment

Some of these recommendations involve amending the *Health Insurance Act 1973*. This should be done carefully and in collaboration with the AMA. The AMA would also support the findings of this report being shared with the medical colleges, associations and societies as well as the relevant bodies representing other health professionals under the PSR.

October 2022