

SENATE STANDING COMMITTEES ON COMMUNITY AFFAIRS

REVIEW OF

PROFESSIONAL SERVICES REVIEW ("PSR") SCHEME ("The Scheme")

Background

1. I make these submissions as the lawyer for and friend of Dr Peter Thomas Tisdall until his sudden death on the 26th June 2011.
2. Dr Tisdall practiced as a General Practitioner at Kyabram for approximately 46 years.
3. He was the subject of four Referrals to the Director of PSR ("the Director") by the Health Insurance Commission (now know as Medicare Australia) between 1997 and 2003.
4. The Referrals led to five Applications for Judicial Review to the Federal Court, five Appeals to the Full Federal Court and one Application for Leave to Appeal to the High Court by Dr Tisdall
5. In Referrals 101 and 420 it was alleged that Dr Tisdall engaged in inappropriate practice because the high volume of medical services provided by him may not have contained sufficient clinical input and because his prescribing may not have been reasonably necessary for the treatment of his patients.

In Referrals 325 and 375 it was alleged that Dr Tisdall engaged in inappropriate practice because he rendered eighty or more services per day on more than twenty days during the specified periods.
6. Dr Tisdall therefore had extensive experience in the operation of the Scheme.
7. I believe it will assist the Senate Committee if it is informed of my observations of the conduct of the Scheme in relation to Dr Tisdall's Referrals and the professional and personal implications for Dr Tisdall arising from the Referrals.

Dr Tisdall

8. It should be said at the outset that Dr Tisdall was one of the highest billing doctors in Australia. It was therefore inevitable that he came to the attention of Medicare.

9. However, it was never alleged that Dr Tisdall over serviced his patients or that he defrauded the Medicare Scheme. To my knowledge, he was never the subject of a complaint to the Medical Practitioners Board or elsewhere about the standard of his medical treatment.
10. Dr Tisdall commenced to practice in Kyabram in 1966 initially in partnership with other doctors and, since 1991, as a sole practitioner.
11. Kyabram has a population of approximately 6,000 to 7,000 people. There are a further 11,000 to 12,000 people living in surrounding districts who access medical services in Kyabram. There is a public hospital in Kyabram which has about 46 acute beds and a nursing home with about 30 beds. There is also a 40 bed aged care hostel in the town.

The Doctor/Patient ratio in the Murray Valley Region was, at the time of the Referrals, over 1/2000. The Commonwealth recommended ratio was 1/1280.

The region is classified as being a Rural Remote Metropolitan Area 5 (on a scale of 7) because of the difficulty residents in the region have in accessing medical services and also because of the difficulties the area has in recruiting and retaining general practitioners.

12. Dr Tisdall provided a wide range of medical services including surgery and obstetrics.
13. He typically saw patients and made hospital visits between about 9.00 am and 9.00 pm each week day, from 8.00 am to about 1.00 pm Saturdays, and sometimes much later, and was on call for his patients 24 hours a day, seven days a week. He rarely took holidays and only had an occasional weekend off.
14. In about 2000 he had about 7,000 to 8,000 active patients. About 40% of Dr Tisdall's patients came from up to 150 kilometres away as they were unable to see other doctors in the locality where they lived.
15. A significant proportion of his patients were disadvantaged and underprivileged members of the community and people with particular ethnic backgrounds including Aboriginal, Muslim and Italian. About 50% of his patients were bulk billed.

16. Dr Tisdall considered he had an obligation to treat whoever sought medical care from him as he was aware that, if he did not do so, it was unlikely that they could have obtained treatment elsewhere when it was required.
17. Dr Tisdall incurred heavy penalties as a result of his commitment to meeting the demand for medical services in his community.

In Referral 106 he was ordered to repay the Medicare benefits he received in the period during which he was considered to have engaged in inappropriate practice and he was disqualified in respect of all Medicare services for one year and services to which an Item related in Group A1 of Part 3 of the General Medical Services Table for two years. This meant that his patients could not claim Medicare benefits for services provided by Dr Tisdall or from doctors to whom they had been referred by him during the stated periods.

In Referral 420 Dr Tisdall also ordered to repay the Medicare benefits he received during the referral period and was disqualified in respect of all medical services for one year.

18. The Act provides that when a doctor has been found to have engaged in inappropriate practice on two or more occasions he can be referred to the Medicare Participation Review Committee. This committee has the power to impose a further penalty on the doctor notwithstanding that he or she has already been punished.

Dr Tisdall was referred to the Medicare Participation Review Committee. It determined that the periods of disqualification imposed by the Determining Authority in relation to Referrals 106 and 450 were not to be served concurrently as would have otherwise occurred because the penalties were imposed at about the same time. This meant that Dr Tisdall was disqualified in respect of all medical services for 2 years.

19. There is no clearer demonstration of the determination of Dr Tisdall to serve his community and to resist what he considered to be the misguided actions of the Director and Medicare than the fact that, throughout the period of his disqualification, he continued to conduct his practice. In most cases Dr Tisdall only charged his patients the gap between the standard consultation fee and the Medicare refund which the patient would otherwise have been entitled to receive. In many cases he did not charge his patients at all.

20. In Referrals 325 and 375 the Committees also found that Dr Tisdall had engaged in inappropriate practice. He unsuccessfully applied to the Federal Court for a Judicial Review of the Committee's findings and then successfully appealed to the Full Federal Court against the decision of the lower court. The court ordered that the matters be referred back to the Committees for determination according to law. The Director was ordered to pay Dr Tisdall's costs.

The Committees again made the same findings. Dr Tisdall, for the second time, unsuccessfully applied to the Federal Court for a judicial review of the Committee's findings in Referral 325 and successfully appealed to the Full Federal Court against the decision of the lower court. The court ordered that the matters be referred back to the Committee for the third time. I have not been informed by the Director as to whether he intends to continue with the Referral.

An Application for Judicial Review was also lodged in respect Referral 375. It has been held in abeyance pending the outcome of Dr Tisdall's appeals in relation to Referral 325. The Director has not yet advised of his intentions regarding the application following the successful appeal against the findings of the Committee in Referral 325

Conduct of the Referrals

21. It was apparently the view of Medicare that a doctor should see no more than six patients an hour. Any doctors who regularly billed Medicare for services which indicated that they saw more patients were, it seems, suspected of engaging in inappropriate practice.

I therefore believe that each of the Referrals in relation to Dr Tisdall were driven by an intent to stop him seeing so many patients regardless of the circumstances of his doing so.

22. In Referrals 106 and 420 it was apparent that the Director and the Committees considered that Dr Tisdall could not have adequately treated his patients to satisfy the requirements of the category of consultation for which a patient was billed because he saw more than 6 patients an hour. This opinion prevailed regardless of what Dr Tisdall had to say as to the reason for seeing the number of patients alleged, his professional skills and the outcome of the treatment of his patients.
23. Referral 106 related to services provided in 1996. Although I was not acting for Dr Tisdall at the time I understand that he was directed to produce his medical records

for inspection and that 77 services were selected for investigation. The Act allows a PSR committee to reach a conclusion as to the appropriateness of the conduct of a doctor in relation to all his or her consultations during the referral period based on its finding in relation to the sample of services considered by the committee.

In Dr Tisdall's case the sample was a very small proportion of the services rendered by him during the referral period.

24. The transcript of the hearing showed that the Committee vigorously cross-examined Dr Tisdall in relation to the selected services. It appears that he was not previously notified of the services which would be examined.
25. Understandably, given the time that had passed and the absence of notice, Dr Tisdall was unable to directly recall the circumstances of the consultations and was only able to answer questions by reference to his notes (which were admittedly brief), his knowledge of the patient and his usual practice when treating patients. Members of the Committee questioned his medical knowledge and often expressed a view as to the appropriateness of the treatment he prescribed or his diagnosis notwithstanding that they had not seen the patient and therefore could not have been aware of the condition of the patient when he or she presented for treatment
25. At Dr Tisdall's request, the Committee allowed him time to respond to the allegations in relation to the services being considered.
26. Fourteen eminent specialists provided references which endorsed the treatment provided by Dr Tisdall and said that he was a competent general practitioner with sound medical knowledge and showed good clinic judgment and acumen when treating his patients
27. The opinions of the specialists were totally disregarded by the Committee.
28. Referral 420 followed the same process as Referral 106. That Committee also in effect concluded that the inability of Dr Tisdall to recall the circumstances of the services being examined, the brevity of his notes and its view that he lacked medical knowledge allowed it to conclude that Dr Tisdall had engaged in appropriate practice because he had spent insufficient time with his patients for him to provide what was considered by the Committee to be the appropriate clinical input.
29. The intent of Medicare and the Director was demonstrated by the fact that it instigated reviews of Dr Tisdall in successive periods between 1996 and 2003. When

a review was concluded in relation to a particular period it was immediately followed by another referral regarding a subsequent period. It was apparent to Dr Tisdall that he would be pursued until he was unable to practice or he was persuaded to turn his back on the overwhelming demand for medical services in the region where he lived.

The fact that there was a critical shortage of doctors in the region and that many thousands of people would be denied access to medical services if Dr Tisdall was unable to practice was apparently disregarded.

30. The intent of the Director was also demonstrated when he apparently issued a press release to the local newspaper immediately after Dr Tisdall discontinued his appeals and the penalties arising from Referrals 106 and 420 came into effect. The press release is attached. It can only be assumed that the purpose of notifying the press, if this occurred, was to inform the community that Dr Tisdall would be unable to treat patients during the period of disqualification..
31. The Kyabram community was so incensed about the way Dr Tisdall was treated by the Director that approximately 6,000 of them signed a petition supporting him.
32. In 2002 the Health Insurance Act ("the Act") was amended to provide that inappropriate practice may be constituted by a Doctor providing eighty or more services on twenty or more days during a twelve month period ("the 80/20 Rule"). Referrals 325 and 375 were based on this amendment.
33. In those Referrals, evidence was given to the Committees that there was a shortage of doctors in the region. None of the evidence was contradicted by evidence produced by the Medicare or questioned by the Committees. The Committees in fact found that there was a critical shortage of doctors. Notwithstanding the evidence and its findings, the Committees still found that Dr Tisdall had engaged in inappropriate practice because they considered that there were other doctors who could have seen his patients. Apart from relying on Medicare statistics which simply showed that there were other doctors practicing in Kyabram during the referral period, there was no evidence whatsoever to support the Committee's finding. The Full Federal Court subsequently agreed.

By reaching this conclusion, the Committee was able to decide that the exception that allowed a doctor not to comply with the 80/20 Rule if there was an absence of medical services for his patients in the location where his practice was located did not apply.

Deficiencies of the Scheme

34. The manner in which the Scheme has been administered has, in my opinion, lead to the creation of a perception held by doctors that it is merely a division of Medicare and, as such, it lacks the independence and impartiality that was intended by the Act. It is perceived to be just a formality in the process of securing the outcomes required by Medicare.

35. I believe the perception arises from the following:-
 - 35.1 Doctors who are appointed to committees that investigate a doctor are not necessarily peers as they may not have had experience in practicing in similar circumstances to those in which the doctor practiced. For example, a committee considering a General Practitioner working in a remote rural location should consist of at least one member who has had experience in working in a similar environment.

 - 35.2 Doctors are recommended for appointment to the PSR Panel and as Deputy Directors of PSR by the Director. He submits the names of recommended doctors to the Minister who inevitably accepts the recommendations. The Director therefore both investigates a doctor being reviewed and is perceived to in effect appoint the doctors who are required to determine whether a doctor has engaged in inappropriate practice.

 - 35.3 Doctors are appointed to the PSR Panel for 5 years. As they are appointed and reappointed on the recommendation of the Director it is possible that they are appointed because of their views on Medicare policies concerning the operation of the Medicare scheme and the outcome of their previous determinations when sitting on committees.

 - 35.4 The manner in which committees conduct adjudicative referrals suggest that outcomes which were adverse to a doctor was a forgone conclusion. The nature of questions and comments of committee members during the committee hearings, their response to evidence and submissions and their findings indicate that they approach their task on the basis of a presumption that a doctor has engaged in inappropriate practice because he or she has been brought before the committee for investigation. In other words, the presumption of innocence does not apply.

I was left with the clear impression at the end of the hearings of the three Committees which I attended with Dr Tisdall that it would not have mattered what was said or submitted by him the Committees were intent on concluding that he had engaged in inappropriate practice.

36. Although the purpose of the Scheme is to prevent doctors engaging in inappropriate practice, the object is in reality to control the payment of Medicare benefits by stopping doctors rendering what it considered to be an excessive number of services.
37. Medicare appears to hold the view that, if a doctor renders more than what it considers to be an appropriate number of services per day, he or she has engaged in inappropriate practice regardless of the circumstances in which the services were rendered.
- 38 Medicare's policy on how many services a doctor should provide is enforced by referring doctors who it considers are providing excessive services to the Director for investigation. Although the stated reason for the referrals is that Medicare is concerned that the doctor may have engaged in inappropriate practice because the standard of medical services provided by the doctor may not have been acceptable, the underlying reason is that the doctor has seen too many patients.

The conduct of the process that follows suggests that the Director and the committees he appoints are intent on supporting the reasons provided by Medicare when referring the doctor for investigation. In other words, the perception of doctors is that the Director determines without question that there is a case to answer when receiving a referral from Medicare and the committee he appoints to consider the referral predictably decides that the doctor has engaged in inappropriate practice

39. The failure of the Minister to comply with the Act when appointing doctors to the PSR Panel. As has recently been found by the Full Federal Court, the Minister failed to consult with the AMA before making the appointments.

It may be presumed that the requirement that the Minister do so was intended to ensure that doctors appointed to the Panel are representative of the doctors who they are asked to review and that they are sufficiently independent of Medicare and the Director to ensure impartiality in their deliberations.

The documents produced by the Commonwealth in the Federal Court proceedings in which the validity of appointments to the Panel was considered clearly showed that

the Minister failed to comply with the Act because of a serious omission by the Director. As the Minister acted on his recommendations it was the responsibility of the Director to ensure that consultation with the AMA had occurred when submitting his recommendations to the Minister. His failure to do so may explain why the committees appointed from Panel members are not seen to be impartial.

40. I believe the Scheme is unfair for doctors for the following reasons:-

40.1. The right of the Director to take a very small sample of a doctor's consultations and the application of findings by a committee in relation to that sample to all the doctor's consultations during the referral period may encourage the Director to select a sample that best supports the allegations made against the doctor.

40.2 The Court has stated that decisions of PSR committees are not to be reviewed in the same manner as a decision of a court notwithstanding that the determination of a committee could result in very severe penalties being imposed on a doctor. This means that PSR committees are not to be scrutinized by way of "an over zealous judicial review". Therefore they can conduct their hearings, consider evidence and adjudicate on the allegations against a doctor in a manner that may be unacceptable in a court of law.

40.3 If a doctor successfully appeals to a Court, the Court can only refer the matter back to the same committee for a rehearing. That committee is unlikely to ignore its previous findings after a rehearing.

40.4. It is very costly for a doctor to appeal against a finding of a committee.

In Dr Tisdall's case, his first appeals to the Federal Court were unsuccessful. He therefore had to incur further expense in appealing to the Full Federal Court to obtain the outcome to which he believed he was entitled.

40.5 The penalties imposed on a doctor who is found to have engaged in inappropriate practice are determined entirely at the discretion of the Determining Authority.

The possible penalties outlined in the Act are potentially so substantial that they may effectively prevent the doctor from continuing to practice and may cause the doctor to suffer extreme financial stress through both having to

repay Medicare benefits and being unable to earn an income during a period of disqualification.

A doctor cannot appeal against the severity of a penalty.

41. The introduction of the 80/20 Rule and exceptions to the application of the Rule in my view correctly introduced a degree of transparency to the objectives of the Scheme by prescribing a clear limit on how many services a doctor could render.

The exceptions in the Regulations also appropriately recognize situations in which a doctor was unable to avoid exceeding the limit.

In particular, the Rule avoids the need for a committee to retrospectively examine the quality of medical services provided by a doctor in response to Medicare's concern that a doctor was seeing too many patients or providing too many services.

However, the conduct of Dr Tisdall's Referrals in relation to his breaching the 80/20 Rule demonstrated that Medicare was not prepared to accept that there could ever be circumstances in which the exceptions would apply.

42. I consider that the 80/20 Rule is defective because :-
- (a) it applies to services rendered, and not the number of patients seen by a doctor;
 - (b) a service provided in an "A" consultation, which can be very short, is counted equally with a "B" or "C" consultation; and
 - (c) it does not recognize that a doctor who may choose or is compelled by the demand for his or her services to work long hours each day can still provide an appropriate level of clinical input and comply with the standards Medicare expects in relation to the services rendered by the doctor.

Conclusion

43. The personal stress on a doctor under review cannot be imagined. Many find it difficult to comprehend why they are subject to prosecution by the Director as they have not set out to corrupt the system

44. Many doctors do not have the financial resources or the drive to resist a referral and therefore simply admit the allegations and pay the penalties imposed on them.
45. Dr Tisdall was subjected to considerable stress and incurred substantial expense as a result of referrals that continued for more than 12 years. He felt frustrated and powerless because he was unable to convince Medicare that his only purpose in seeing a large number of patients was to satisfy a huge demand for medical services from the residents of the community in which he lived.

The cost to his personal life and his family was immense. It may even have caused his premature death.

46. Had he been alive today I know Dr Tisdall would have been delighted that the Scheme is finally being reviewed and that the deficiencies in its operation will hopefully be rectified.
47. Finally, the Senate Committee should now that the community in which Dr Tisdall lived and practiced acknowledged his sacrifice and determination when they lined the streets of Kyabram and clapped as his funeral procession passed by. Many openly displayed emotion when they did so.

Alan Williamson. LL.B, B.Juris



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Doctor withdraws High Court appeal

December 16 2005
Kyabram Free Press

Kyabram doctor Peter Tisdall has withdrawn his appeal to the High Court of Australia against a decision to disqualify him from participating in the Commonwealth Medicare benefits scheme.

The case was due to be heard today, however, Tisdall withdrew his application on Tuesday.

Last December, the Federal government-appointed Professional Services Review recommended Dr Tisdall be disqualified for one year after he was found to have engaged in inappropriate practice.

The disqualification became effective from Wednesday.

It means he will not be permitted to bulk bill, nor can his clients receive rebates under Medicare for the period of his disqualification.

PSR also ruled that Dr Tisdall be disqualified for two years from providing services relating to Group A1 of Part 3 of the General Medicare Services Table. Group A1 applies to part of the medical benefits schedule which relates to 'vocationally' registered practitioners who receive a Medicare rebate much higher than their nonregistered contemporaries.

Dr Tisdall was also ordered to repay to the Commonwealth Medicare benefits \$138,594.15; as well as be reprimanded and counselled by the Director of Professional Services Review (PSR).

PSR director Tony Webber said this week he was pleased to see an end to a "long and drawn out process that has been ongoing since 1996."

The Health Insurance Commission referred to PSR Dr Tisdall's case in September 1997 because of his high total volume of services (27,686 in 1996), high services per patient (6.35) and high prescribing (35,000 items) during the referral period January 1, 1996 to December 31, 1996.

The commission identified that Dr Tisdall's volume of services in the referral period was above the 99th percentile of all active vocationally registered general practitioners in Australia (16,042 services).

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