



Australian Government
Department of Health

SECRETARY

Committee Secretary
Senate Standing Committee on Community Affairs Legislation
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into the Private Health Insurance Amendment Bill (No. 2) 2014

Thank you for the opportunity to provide a written submission to the Community Affairs Legislation Senate Committee's inquiry into the *Private Health Insurance Amendment Bill (No. 2) 2014*.

Please find attached the Department of Health's submission to this inquiry.

Yours sincerely

Martin Bowles PSM
Secretary

4 May 2015

COMMUNITY AFFAIRS LEGISLATION COMMITTEE
INQUIRY INTO:
PRIVATE HEALTH INSURANCE AMENDMENT BILL (NO. 2)
2014

SUBMISSION BY THE AUSTRALIAN GOVERNMENT
DEPARTMENT OF HEALTH
4 MAY 2015

Introduction

The *Private Health Insurance Amendment Bill (No. 2) 2014* (the Bill) seeks to amend the *Private Health Insurance Act 2007* (PHI Act) and the *Ombudsman Act 1976* (Ombudsman Act) to transfer the functions of the Private Health Insurance Ombudsman to the Office of the Commonwealth Ombudsman. The Bill will also operate to ensure that provisions of the PHI Act relating to the calculation of the Australian Government Rebate on private health insurance (the Rebate) that were intended to be repealed by the *Private Health Insurance Legislation Amendment Act 2014* will be taken never to have commenced.

Background

Transfer of functions of the Private Health Insurance Ombudsman

As part of the 2014-15 Budget: *Smaller Government - additional reductions in the number of Australian Government bodies*, it was announced that the statutory agency of the Office of the Private Health Insurance Ombudsman would be merged into that of the Office of the Commonwealth Ombudsman. These changes are expected to reduce duplication, improve coordination and increase efficiency in how public funds are used to deliver services to the community.

The Private Health Insurance Ombudsman will remain a separate statutory office. However, the person who holds the position of the Commonwealth Ombudsman will also automatically hold the position of the Private Health Insurance Ombudsman. This is consistent with the approach taken for other industry ombudsmen created under the Ombudsman Act. As part of the transfer of functions, the opportunity has been taken to streamline some of the investigative procedures of the Private Health Insurance Ombudsman with those of the Commonwealth Ombudsman.

The Bill aims to make minimal changes to the existing framework. Amendments have only been made where necessary to fit within the Commonwealth Ombudsman's current independence, accountability and review provisions.

Removal of references to the Base Premium measure

The previous Government intended that the Rebate be calculated by reference to a 'base premium'. The *Private Health Insurance Legislation Amendment (Base Premium) Act 2013* was enacted to implement this policy with effect from 1 April 2014, although some provisions took immediate effect in 2013.

Prior to the full commencement of the base premium measure the Government decided to use a different, simpler mechanism for calculating the Rebate.

In March, 2014 the *Private Health Insurance Legislation Amendment Act 2014* was passed with the intent of removing all references to a base premium from the PHI Act. However, due to an unintended delay in the granting of Royal Assent it was only partially effective in doing so. The Bill will provide for references to the base premium, inadvertently included in the PHI Act, to be taken to have never been included.

Implications of the Bill

Financial Impact

The transfer of functions of the Private Health Insurance Ombudsman is estimated to result in net savings to industry of approximately \$0.6 million over three years. Any savings will be reflected in levies payable by the private health insurance industry.

The removal of the Base Premium provisions will not have any financial impact. Although reference to base premiums remains in a small number of provisions in the PHI Act, the removal of remaining references to the concept of a base premium will not affect the way the premiums reduction scheme is applied for insurers and relevant policy holders.

Services to be provided by the Private Health Insurance Ombudsman

The Office of the Private Health Insurance Ombudsman will be established by the Ombudsman Act and the person who holds the position of the Commonwealth Ombudsman will also hold the position of the Private Health Insurance Ombudsman. As part of the transfer of functions, the opportunity has been taken to streamline some of the investigative procedures of the Private Health Insurance Ombudsman with those of the Commonwealth Ombudsman.

As part of the transfer of functions of the Private Health Insurance Ombudsman to the Office of the Commonwealth Ombudsman, 11 of the 12 current staff positions of the Office of the Private Health Insurance Ombudsman will be transferring to the Office of the Commonwealth Ombudsman. The transfer of staff positions will ensure retention of specialised industry knowledge and provide a continued high level of service to consumers.

The following primary functions of the Private Health Insurance Ombudsman functions will be retained under the Ombudsman Act:

- (a) the same classes of individuals and organisations will be able to make complaints to the Private Health Insurance Ombudsman, namely current or prospective policy-holders, private health insurers and brokers, and health care providers;
- (b) complaints may be made against the same classes of individuals and organisations, namely insurers, brokers and health care providers;
- (c) complaints may be made to the Private Health Insurance Ombudsman on the same grounds, in particular complaints about health care providers will still need to be in relation to private health insurance arrangements and either:
 - (i) also involve a complaint against an insurer,
 - (ii) be made by an insurer or policy-holder; or
 - (iii) if the complainant is another health care provider or a private health insurance broker, must include an insurer or policy-holder as a complainant.

Additionally, the Private Health Insurance Complaints Levy will continue to be collected to support the investigation of private health insurance complaints by the Commonwealth Ombudsman. The privatehealth.gov.au website will also continue to operate as it does now.

The Private Health Insurance Ombudsman will also retain the current mechanisms for dealing with a complaint which are:

- conducting mediation;
- referring a complaint to the subject of the complaint; and
- investigating the complaint.

The Private Health Insurance Ombudsman will continue to be unable to take, or continue to take, any of these actions without the agreement of the complainant. The Private Health Insurance Ombudsman will also be unable to commence, or continue to conduct, mediation or investigate a complaint once it is withdrawn.

The Private Health Insurance Ombudsman will also continue to be able to undertake own-motion investigations into the practices and procedures of a private health insurer or private health insurance broker, or into the practices and procedures of a health care provider where there is a nexus with private health insurance arrangements or an insurer.

In line with current provisions in the PHI Act and the Ombudsman Act, the Private Health Insurance Ombudsman will have the power to compel the production of information and records relating to a complaint or investigation from any person who the Ombudsman reasonably believes capable of giving them.

Review of decisions

Currently some decisions made by the Private Health Insurance Ombudsman under the PHI Act are reviewable by the Administrative Appeals Tribunal (the Tribunal).

Under the PHI Act the subject of the complaint currently has a statutory power to ask the Private Health Insurance Ombudsman to extend the time for reporting back to the Ombudsman and, if the Ombudsman refused, could seek review of the decision by the Tribunal.

The Bill removes the provisions for the subject of a complaint to ask the Ombudsman for additional time to respond, and for the subject of the complaint to ask the Ombudsman to extend the time for reporting back. These provisions have been removed to ensure consistency with the *Ombudsman Act 1976* and to provide efficiencies by streamlining the administrative processes of the Commonwealth Ombudsman. It should be noted that in doing so, these changes are expected to benefit consumers by potentially providing faster resolutions to complaints, as those organisations that have been complained about will now be required to report within the set timeframes without the ability for delays or extension. Accordingly, the associated power of Tribunal review of decisions on extensions of time have not been included.

Judicial review of decisions about the issuing of notices to report to the Private Health Insurance Ombudsman or provide information or documents to the Ombudsman remains available. This gives persons affected by such decisions an avenue to have the legality of the decisions reviewed.

The Commonwealth Ombudsman also offers an internal review process. This process allows the complainant to seek an internal review of the Commonwealth Ombudsman's decision within three months from the date of the original decision. More information on this process

can be found on the Commonwealth Ombudsman's website at
<http://www.ombudsman.gov.au/pages/making-a-complaint/review-of-our-decisions/>

Ministerial powers

The power enabling the Minister for Health to intervene where the Private Health Insurance Ombudsman decides not to investigate a complaint has not been transferred to the Ombudsman Act. This is due to the Commonwealth Ombudsman being an independent statutory office holder and not subject to direction by anyone on how complaints are to be managed. This is consistent with the approach taken for other industry ombudsmen created under the Ombudsman Act. Further this power has never been used by the current Minister for Health or any of her predecessors.

The provision enabling the Minister for Health to request the Private Health Insurance Ombudsman to undertake an investigation has also not transferred to the Ombudsman Act for the abovementioned reasons. However, it must be made clear that this does not preclude any person, including the Minister for Health or any parliamentarian, from raising concerns with the Commonwealth Ombudsman for their consideration.

Continuity of services

As part of the transfer of the functions of the Private Health Insurance Ombudsman to the Office of the Commonwealth Ombudsman, 11 of the 12 current staff positions of the Office of the Private Health Insurance Ombudsman will be transferring to the Office of the Commonwealth Ombudsman. The transfer of these staff positions will ensure retention of specialised industry knowledge and provide a continued high level of service to consumers.

Additionally, the Private Health Insurance Complaints Levy will continue to be collected to support the investigation of private health insurance complaints by the Commonwealth Ombudsman. The privatehealth.gov.au website will also continue to operate as it does now.

Mediations

The Private Health Insurance Ombudsman will continue to be able to mandate attendance at mediation by insurers, brokers or health care providers. Failure to attend some or all of a mediation where directed, and where the other party attended or was willing to attend, remains an offence. However, where a medical practitioner is required to attend mediation he or she will still be able to appoint a representative to attend on his or her behalf.

Additionally, evidence of anything said by a person during mediation, whether their participation is voluntary or has been ordered by the Private Health Insurance Ombudsman, will remain inadmissible in any Federal or State or Territory court or in any proceedings to hear evidence under Commonwealth, State or Territory law. This protection will continue to encourage parties to participate frankly in order to encourage a speedy resolution to a complaint. Mediations are most commonly conducted between health care providers and insurers.

Therefore, failure to attend some or all of a mediation where directed, and where the other party attended or was willing to attend, remains an offence. However, the corresponding penalty for the offence has been reduced from 30 penalty units to 10 penalty units to better

align with the penalty rates contained with the Ombudsman Act. Further, it should be noted that there has never been an instance in which the Private Health Insurance Ombudsman has had to enforce this penalty.

Information Gathering

Under the PHI Act, the Private Health Insurance Ombudsman was not, as part of handling a complaint, able to request information about the complainant's dealings with the subject of the complaint without the complainant's consent. The Private Health Insurance Ombudsman also was not, as part of an own-motion investigation, able to request information or records relating to a particular individual without the consent of the individual. These limits on the information gathering power are not maintained under the Ombudsman Act. This change has been made to better align with current limitations on the Commonwealth Ombudsman's information gathering powers.

However, information and records, including personal information provided to the Private Health Insurance Ombudsman, will be protected from inappropriate disclosure by the general secrecy provisions applying to the Ombudsman Act. It will be an offence for the Private Health Insurance Ombudsman, a member of staff of the Office of the Commonwealth Ombudsman, or a person appointed by the Private Health Insurance Ombudsman, to undertake mediation, to record or disclose to any other person any information disclosed to or obtained under the Ombudsman Act. This general prohibition on recording and disclosure is subject to a number of exceptions to enable the Private Health Insurance Ombudsman to effectively perform its role, including:

- a) where the recording or disclosure is in the performance of the person's powers and functions under the Ombudsman Act;
- b) where the disclosure is made as part of a report made under the Ombudsman Act and, in the Ombudsman's opinion, the matters ought to be disclosed in the course of setting out grounds for the findings and recommendations in the report; and
- c) providing records and information to the Australian Competition and Consumer Commission (ACCC) for the purposes of referring a complaint to the ACCC, which can only be done with the consent of the complainant.

Additionally, section 35A of the Ombudsman Act also enables the Ombudsman to make a statement or disclose information, subject to certain exceptions, in respect of an investigation if it is in the interest of a person or the public interest to do so.

The Private Health Insurance Ombudsman will also have the power to share certain information with specified agencies including the Department of Health and the Department of Human Services. However, this information can only be information that relates to a private health insurer, an applicant to become a private health insurer, a person carrying on health insurance business or a director or officer of one of the bodies mentioned.

The application of these provisions will not limit the protections previously provided to individuals under the PHI Act.

It should be noted that under the PHI Act, the only statutory process available to the Private Health Insurance Ombudsman to gather information was to make a formal written request for information or records to the subject of a complaint. Failure to comply with such a request was an offence of strict liability. However, for consistency with information gathering powers

available under the Ombudsman Act, the Private Health Insurance Ombudsman will now be able to either request information and documents from a person, or formally require the production of information or records by written notice. This will allow for a more graduated information gathering approach.

Further, while it will still be an offence to fail to produce information or documents pursuant to a written notice the offence will not be one of strict liability, although the evidentiary burden will be upon the defendant to prove that they had a reasonable excuse for failing to comply. The transition away from strict liability offences is due to the understanding that a defendant should be able to establish a reasonable excuse for their failure to comply with the requirements of the Ombudsman Act.

Persons providing information or producing documents to the Private Health Insurance Ombudsman in the reasonable belief it will assist the Ombudsman, whether following a request or compelled by the Private Health Insurance Ombudsman by written notice, will continue to have protections in relation to the provision of the information.

A person will not be liable to any penalty under the provision of any enactment by reason of giving the information or documents to the Private Health Insurance Ombudsman. As under the PHI Act, for the purposes of the *Privacy Act 1988* and State and Territory laws which provide that personal information may be disclosed where authorised by law, the disclosure of personal information to the Private Health Insurance Ombudsman will be taken to be authorised by the Ombudsman Act.

Protections will be retained to ensure that a person furnishing the Private Health Insurance Ombudsman with necessary information is not unfairly disadvantaged by doing so, including by having that information used against them in other proceedings.

Summary

Overall the Bill aims to make minimal changes to the existing framework. Amendments have only been made where necessary to fit within the Commonwealth Ombudsman's current independence, accountability and review provisions; and to repeal provisions left over from the Base Premium indexation arrangements.